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In The
Supreme Court of The United States
October Term 1999

LESA M. PRIMEAUX
formerly known as Lesa M. LaMont
formerly known as Lisa M. Bad Wound

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition For A Writ Of Certiorari
To The United States
Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Plaintiff in this case seeks damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq., for her sexual assault and rape on November 9, 1991, by a Bureau of Indian Affairs law enforcement officer. Plaintiff filed a complaint against the United States pursuant to the FTCA alleging negligence under South Dakota law. The United States defended asserting the officer was not acting within the scope of his employment when he raped Plaintiff. At trial, the district court held that Plaintiff was in fact raped by the officer but that the rape did not occur within the officer's scope of employment.

Plaintiff appealed. A panel of the Eighth Circuit Court of Appeals remanded to the district court for consideration of the government's liability under the doctrine of apparent authority. Primeaux v. United States, 102 F.3d 1458 (8th Cir. 1996) (Primeaux I). On remand the district court held there was an insufficient nexus between Plaintiff's rape and the scope of the officer's actual or apparent authority. A second panel of the Eighth Circuit reversed. Primeaux v. United States, 149 F.3d 897 (8th Cir. 1998) (Primeaux II). The dissenting opinion of the second panel argued that the respondeat superior theory of apparent authority was not a legitimate part of Federal Tort Claims Act scope of employment analysis. The United States petitioned for rehearing asserting for the first time the issue raised by

the Primeaux II dissent. The Eighth Circuit ruled en banc, 6 to 5, that South Dakota's respondeat superior law of apparent authority did not apply in determining scope of employment under the FTCA and, therefore, the officer was not acting within his scope of employment when he raped Plaintiff. Primeaux v. United States, 181 F.3d 876 (8th Cir. 1999) (Primeaux III). This petition presents the following question:

Does a State's respondeat superior law apply in determining scope of employment under the Federal Tort Claims Act?

PARTIES TO THE PROCEEDINGS

This case was filed in the Western Division of the District of South Dakota. The named Plaintiff is Lesa Primeaux who has previously been known as Lesa LaMont and Lisa Bad Wound. The sole Defendant, pursuant to 28 U.S.C. § 32674, is the United States of America.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Petitioner states that she is an individual and thus has no corporate parents or subsidiaries.

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Plaintiff respectfully petitions for a writ of certiorari to review the en banc judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals, *see* Appendix ("Apdx.") A - 1, is reported at 181 F.3d 876 (8th Cir. 1999). The first panel's decision of the court of appeals, Apdx. B - 36, is found at 102 F.3d 1458 (8th Cir. 1996). The second panel's decision is reported at 149 F.3d 897 (8th Cir. 1998), and reprinted at Apdx. C - 52. The transcript of the district court's bench ruling at the conclusion of trial is reprinted at Apdx D - 74.

JURISDICTION

The decision sought to be reviewed was filed on June 17, 1999. The court of appeals entered its final judgment after denial of rehearing on August 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1346(b) of Title 28, United States Code, provides, in pertinent part:

> [T]he district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 of the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]

Section 2680(h) of the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –

> (h) Any claim arising out of assault, battery, . . . *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery[.]
>
> For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The complete text of the relevant provisions of the Federal Tort Claims Act is set forth in Apdx. E - 90.

STATEMENT OF THE CASE

The district court had original jurisdiction in this case under 28 U.S.C. §§ 1346(b) and 2671, et seq. The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner respectfully submits that this case presents an issue worthy of certiorari review. The Eighth Circuit Court of Appeals held en banc that South Dakota's respondeat

superior doctrine of apparent authority was not applicable to the scope of employment analysis in Federal Tort Claims Act actions. The Eighth Circuit limited the analysis of scope of employment solely to conduct within an employee's direct scope of employment as defined by state law. The court of appeals held that issues of vicarious liability, particularly apparent authority, are irrelevant to scope of employment under the Federal Tort Claims Act. According to the en banc Eighth Circuit, government liability in a Federal Tort Claims Act action can not be premised on vicarious liability under the doctrine of respondeat superior. Petitioner submits that this decision conflicts with the prior precedent of this Court and with rulings in several other circuits including prior rulings of the Eighth Circuit.

A. Factual Summary

The facts of this case are not in dispute. Neither Petitioner nor the United States appealed any of the district court's factual findings. The relevant facts are:

In the early morning hours of November 9, 1991, a BIA law enforcement officer on the Rosebud Indian Reservation in South Dakota was returning to the reservation from a work-related training seminar in New Mexico. The officer was driving a white government vehicle with official license plates. The car had a police bar on top. A few miles west of Martin, South Dakota, a community not on the

reservation[1], the officer came upon Petitioner walking toward Martin. Petitioner's car had become stuck in a snow bank. The officer stopped his car and offered to give Petitioner a ride into Martin which she accepted. After driving a short distance, however, the officer turned off the highway onto a side road. He ordered Petitioner out of the car and raped her. *See,* Primeaux v. United States, 181 F.3d 876, 877 (8th Cir. 1999); Apdx. A, 2-4.

The officer was authorized to travel in the police car during his expense-paid trip to and from New Mexico. When he stopped his car beside Petitioner, he activated the light bar on the roof. He told Petitioner he was a BIA officer. Petitioner accepted the ride offered to her by the officer because he was a "cop." The district court found that the officer accomplished his rape of Petitioner by the existence of his agency relationship. The officer himself testified that he believed it part of his duty to offer a ride to a stranded motorist like Petitioner. Id. at 887; Apdx. A, 31-34.

The officer, although not in uniform, was wearing clothing which Petitioner could reasonably have mistaken for a police uniform. The car did not have markings on the sides but had a police radio inside as well as the light bar on the roof. Though not formally "on duty," the officer was on

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[1]Martin is situated between the Rosebud Indian Reservation to the east and the Pine Ridge Reservation to the north and west in an area that was diminished in United States, ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975).

"travel status" and did not have to use personal leave time to attend the training seminar. Primeaux v. United States, 102 F.3d 1458, 1460 (8th Cir. 1996); Apdx. B, 37.

B. Decisions Below

At trial, the officer denied raping Petitioner. On these facts, the district court found that Petitioner was raped by the officer but that the rape did not occur while the officer was acting within the scope of his employment as a BIA officer. 102 F.3d at 1460; Apdx. B, 38-39; Apdx. E - 90. The Eighth Circuit reversed remanding to the district court and directing that the court reassess its ruling in light of the respondeat superior doctrine of apparent authority. Id. at 1463; Apdx. B, 50. On remand, the district court again held for the United States ruling that there was an insufficient nexus between the rape and either the officer's actual or apparent scope of authority. 149 F.3d at 898; Apdx. C, 54.

Once more Petitioner appealed and again the Eighth Circuit reversed, Id. at 898-99, 901; Apdx. C, 54-55, 62-64, the panel holding that the officer had acted under the apparent authority of the United States as recognized by South Dakota's law of respondeat superior. Id. at 901; Apdx. 62-64. The dissent, however, argued that issues of vicarious liability under the doctrine of respondeat superior are not relevant under the Federal Tort Claims Act in determining the government's liability. Id. at 902-03; Apdx. C, 67-69. Based

on this dissent, the United States filed a petition for rehearing arguing for the first time the theory raised by the dissent.

The Eighth Circuit Court of Appeals directed Petitioner to respond to the United States rehearing petition. Thereafter, the Eighth Circuit granted the United States' petition for rehearing en banc. Subsequent to en banc argument on rehearing held January 11, 1999, the Eighth Circuit sitting en banc ruled in a 6 to 5 decision that the doctrine of apparent authority, as recognized under South Dakota law, did not apply in determining whether the United States employee officer acted within the scope of his employment for purposes of the Federal Tort Claims Act. 181 F.3d at 878-79; Apdx. A, 2-5. Petitioner filed a petition for rehearing of this decision as did Judge Lay of the court of appeals; Apdx. F-94 and G - 106. These petitions were denied on August 17, 1999; Apdx. J -128.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S EN BANC DECISION THAT A STATE'S RESPONDEAT SUPERIOR LAW IS NOT APPLICABLE IN DETERMINING SCOPE OF EMPLOYMENT UNDER THE FEDERAL TORT CLAIMS ACT CONFLICTS WITH THE PRIOR RULING OF THIS COURT.

The Eighth Circuit's en banc opinion directly contradicts this Court's holding in Williams v. United States, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955). Williams was a Federal Tort Claims Act (FTCA) case from the Ninth Circuit Court of Appeals, affirming the district court, and holding that the doctrine of respondeat superior did not apply to make the government liable for the negligence of a soldier who, absent on a pass from his duty post, crashed his Army vehicle into Williams' car. Williams v. United States, 215 F.2d 800 (9th Cir. 1954).[2]

In Williams, this Court expressly rejected the argument that the phrase "scope of employment" in the FTCA excludes the state law of respondeat superior. 350 U.S. at 857, 76 S.Ct. at 100. This court vacated the Ninth Circuit's opinion in a terse per curiam opinion stating: "This

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[2]The district court's opinion in Williams is reported at 105 F.Supp. 208 (N.D. Calif. 1952).

case is controlled by the California doctrine of respondeat superior." Id. This Court remanded Williams for consideration in light of the governing respondeat superior principle. *See,* Primeaux, 181 F.3d at 884 (Lay, J., dissenting); Apdx. A, 15.

The Eighth Circuit's opinion that Petitioner's FTCA case is not controlled by South Dakota's respondeat superior law, particularly the rule of apparent authority, lies four square in opposition to this Court's long standing determination in Williams, supra that the doctrine of respondeat superior is applicable in FTCA cases. The Eighth Circuit's position that government liability under the FTCA does not follow the law of respondeat superior as applied by the state where the wrong takes place simply ignores the mandate of this Court laid down in Williams.

II. THE EIGHTH CIRCUIT'S EN BANC DECISION THAT A STATE'S RESPONDEAT SUPERIOR LAW IS NOT APPLICABLE IN DETERMINING SCOPE OF EMPLOYMENT UNDER THE FEDERAL TORT CLAIMS ACT CONFLICTS WITH THE RULINGS OF OTHER CIRCUITS.

Other circuits have recognized and applied the holding of this Court in Williams, supra , that respondeat superior principles apply to FTCA actions. *See,* Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991); O'Toole v. United

States, 284 F.2d 792, 794 (2d Cir. 1960); James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); Rodriguez v. Sarabyn, 129 F.3d 760, 766 (5th Cir. 1997); Richmond v. Straley, 48 F.3d 1139, 1145 (10th Cir. 1995).

The Fourth Circuit, following rehearing en banc in a FTCA case, reaffirmed adherence to Williams. In Johnson v. Carter, 983 F.2d 1316, 1322 (4th Cir. 1993), the Fourth Circuit, citing this Court's Williams decision, supra, and, interestingly, the Eighth Circuit's decision in Brown v. Armstrong, 949 F.2d 1007, 1012 n.7 (8th Cir. 1991), held:

> The determination of whether an employee's actions were within the scope of employment is to be determined according to the *respondeat superior* rules of the State, in this case Virginia, in which the alleged tort occurred. (Italics in the original).

Even the Eighth Circuit, prior to its en banc decision in Petitioner's case, , has abided by the Williams ' rule. In United States v. Farmer, 400 F.2d 107, 109 (8th Cir. 1968)[3], the Eighth Circuit recognized

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[3]Farmer was an action brought under the FTCA against the United States for the negligence of a member of the Army national Guard for injuries resulting from an automobile accident. 400 F.2d at 108.

> . . . that the question of whether a Government employee is acting within the scope of his office or employment must be determined by the *respondeat superior* rule of the state where the negligent act occurred. See Williams v. United States, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed 761 (1955) (Italics in the original).

Likewise, in Brown v. Armstrong, 949 F.2d 1007, 1012 n. 7 (8th Cir. 1991), the Eighth Circuit cited this Court's holding in Williams, supra, noting "Under the FTCA, the law of the place of the alleged tort governs the scope-of-employment question."

In Tonelli v. United States, 60 F.3d 492, 495 (8th Cir. 1995), the Eighth Circuit not only affirmed that the respondeat superior law of the state of the alleged wrong is applicable in a FTCA action but specifically accepted that "apparent authority," the doctrine at issue in Petitioner's case, is included with the term "scope of employment" under the FTCA.[4] The Eighth Circuit stated:

> [T]acit authorization or *apparent authority*

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[4] In Tonelli, the plaintiffs sued the United States under the FTCA alleging that postal workers had stolen mail from plaintiffs' post office box.

> "may exist even if the act is illegal or specifically forbidden by the employer when the nature of the employee's duty is such that its performance would reasonably put the employer on notice that such an act may be committed." (Citations omitted)(emphasis added).

See, Primeaux, 181 F.3d at 882-83 (Lay, J, dissenting); Apdx. A, 15-19.

This case presents the Court with the opportunity to reassert its summary holding in Williams, supra, and clarify uncertainty and conflict between the Eighth Circuit and other circuits about the applicability of state respondeat superior law in FTCA actions. The Eighth Circuit's en banc ruling in Petitioner's case is directly opposite to this Court's decision in Williams and must, therefore, be reversed.

CONCLUSION

The Eighth Circuit's erroneous holding that South Dakota's respondeat superior law is not applicable to Petitioner's FTCA claim violates this Court's long standing opinion in Williams, 350 U.S. 857 (1955). The Eighth Circuit's ruling brings that circuit into direct conflict with this Court and with other circuits which have adhered to Williams.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
EN BANC DECISION

United States Court of Appeals
For the Eighth Circuit

No. 97-2691

Lesa M. Primeaux,	*
Plaintiff-Appellant,	*
	* Appeal from the United States
v.	* District Court for the District
	* of South Dakota.
United States of America,	*
Defendant-Appellee.	*

Submitted: January 11, 1999
Filed: June 17, 1999

Before BOWMAN, Chief Judge,* LAY, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

*The HONORABLE PASCO M. BOWMAN stepped down as Chief Judge at the close of business on April 23, 1999. He has been succeeded by the HONORABLE ROGER L. WOLLMAN.

LOKEN, Circuit Judge.

In the early morning hours of November 9, 1991, Rosebud Reservation tribal officer Kenneth Michael Scott was returning from a work-related training seminar in New Mexico, driving a white government vehicle with official license plates and a police light bar on the roof. A few miles outside of Martin, South Dakota, beyond the limits of his tribal jurisdiction, Scott came upon Lesa Primeaux walking toward Martin because her car was stuck in a snowbank. Scott stopped his car and offered Primeaux a ride to Martin which she accepted. After they traveled a short distance, Scott turned off the highway onto a side road, ordered Primeaux out of the car, and raped her. Primeaux filed this suit for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671 et seq. (the "FTCA").

Following a bench trial, the district court[1] entered judgment for the government, finding that Scott's tortious conduct was not committed within the scope of his employment as a matter of South Dakota law. A divided panel of this court reversed and remanded, directing the district court to reconsider its decision taking into account the doctrine of apparent authority. See Primeaux v. United

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[1]The HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota.

States, 102 F.3d 1458, 1463 (8Th Cir. 1996) ("Primeaux I"). On remand, the district court again entered judgment for the government, finding that Scott had not used his apparent authority as a tribal police officer to commit the rape. Primeaux appealed, and a divided panel again reversed, this time directing entry of judgment in Primeaux's favor and remanding for calculation of her damages. See Primeaux v. United States, 149 F.3d 897, 901 (8Th Cir. 1998) ("Primeaux II"). We granted the government's petition for rehearing en banc, 159 F.3d 1147 (8Th Cir. 1998). Concluding that apparent authority is not a basis for FTCA liability in South Dakota, and that the rape was not within the scope of Scott's government employment, we affirm.

I.

The FTCA is a limited waiver of the federal government's sovereign immunity, allowing claims against the United States:

> for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1); see also 28 U.S.C. § 2672. In determining the extent of the government's FTCA liability, "'[s]cope of employment' sets the line." Gutierrez de Martinez v. Lamango, 515 U.S. 417, 423 (1995). In this case, the parties agree that the determination of whether Scott was acting within the scope of his employment is governed by the law of the State where the tort occurred, South Dakota. See Brown v. Armstrong, 949 F.2d 1007, 1012 n.7 (8Th Cir. 1991).[2] Thus, even if state law extends a private employer's

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[2]This proposition was open to question under the FTCA as initially enacted. See United States v. Lushbough, 200 F.2d 717, 720 (8Th Cir. 1952). But the Supreme Court's two-sentence remand in Williams v. United States, 350 U. S. 857 (1955), was construed as resolving the issue. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act (the Westfall Act), which amended the FTCA to provide that, in a common law tort action against a federal employee, the United States is substituted as defendant if the Attorney General certifies the employee acted "within the scope of his . . . employment." 28 U.S.C. § 2679(d)(1). This certification confers immunity on the employee personally. See H. Rep. No. 100-700 (1988), reprinted in 1988 U.S.C.C.A.N. 5945. In general, an issue of federal employee privilege or immunity is one of federal law because "[n]o subject could be one of more peculiarly federal concern." Howard v. Lyons, 360 U.S. 593, 597 (1959). In

vicarious liability to employee conduct not within the scope of employment, the government's FTCA liability remains limited to employee conduct within the scope of employment, as defined by state law. That is the situation we encounter in this case.

In determining the extent of an employer's vicarious liability for the torts of its employees, the Supreme Court of South Dakota is guided by the principles set forth in the Restatement (Second) of Agency. See Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177, 180-81 (S.D. 1987); Leafgreen v. American Family Mutual Ins. Co., 393 N.W.2d 275, 277 (S.D. 1986); Primeaux I, 102 F.3d at 1462. Like other agency authorities, the Restatement recognizes that conduct within an employee's scope of employment, and conduct relied upon by a third person as consistent with the employee's apparent authority, are distinct bases for imposing vicarious liability on the employer/principal. The distinction is made explicit in § 219(2) of the Restatement:

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this case, Officer Scott was not sued personally so there was no Attorney General certification, and the government does not question the applicability of South Dakota law. Therefore, we do not consider whether the Westfall Act casts doubt on the widely accepted principle that the law of the State where the alleged tort occurred governs the FTCA scope of employment issue.

> (2) *A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:*
>
> * * * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and *there was reliance upon apparent authority*, or he was aided in accomplishing the tort by the existence of the agency relation.

(Emphasis added.) As the Supreme Court recently noted, § 219(2)(d) places apparent authority liability outside the realm of scope of employment liability -- it is "an entirely separate category of agency law." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2290 (1998). Likewise, this court and other circuits have recognized in various contexts that apparent authority and scope of employment are "two theories of vicarious liability." Commerford. v. Olson., 794 F.2d 1319, 1321 (8Th Cir. 1986) (applying Minnesota agency law to federal securities law claims); see Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1269-71 (10Th Cir. 1998) (Title VII); Costos v. Coconut Island Corp., 137 F.3d 46, 48-49 (1st Cir. 1998) (Maine law). If the Supreme Court of South Dakota would follow this Restatement distinction, the panel majority erred in basing FTCA liability on the doctrine of

apparent authority.

To our knowledge, the Supreme Court of South Dakota has not had occasion to apply or even cite § 219(2)(d) of the Restatement. The Court has long followed the agency principle "that a master cannot be held liable for his servant's acts or negligence beyond the scope of his employment, even though the injury could not have been committed without the facilities afforded to the servant by the master." Morman v. Wagner, 262 N.W. 78, 79 (S.D. 1935). In Morman, the Court applied a rather general test for determining scope of employment:

> [I]f the act is for the benefit of the employer, either directly or indirectly, the act is within the general scope of the servant's employment, but if the act performed is not in any way connected with the service for which he is employed, but for his own particular and peculiar purposes, then the act is not within the scope of the employment.

262 N.W. at 78, 79. In the later case of Alberts v. Mutual Serv. Cas. Ins. Co., 123 N.W.2d 96, 98-99 (S.D. 1963), the Court adopted the Restatement's multi-factor test for determining whether employee conduct is within the scope of employment. That test, now found in § 229 of the Restatement, does *not* include the principles of apparent

authority found elsewhere in the Restatement. Its focus is on the relationship of the employee's conduct to the employer's business.[3]

The doctrine of apparent or ostensible authority has a long but independent lineage in South Dakota law. It is in large part statutory, see S.D. CODIFIED LAWS § § 59-3-3, 59-6-3, and its focus is on the reliance of the victim on the agent's apparent authority to act on behalf of a principal. "Strictly speaking, ostensible agency is no agency at all; it is in reality based entirely on an estoppel." Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700, 701 (S.D. 1988). The independent origin and application of the doctrine in early cases are strong evidence the Supreme Court of South Dakota, if faced with the issue in this case,[4] would follow the

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[3]One factor is "whether or not the act is seriously criminal." § 229(2)j). An employee's intentional, violent crime is unlikely to be within the scope of employment, but there are exceptions. For example, in Hasche v. Wagner, 227 N.W. 66 (S.D. 1929), the principal was liable for the resulting violent assault when he told an agent to use such force as might be necessary in repossessing farm equipment.

[4]This inquiry is necessarily hypothetical because federal courts have exclusive jurisdiction over FTCA cases, so the Supreme Court of South Dakota is not presented with cases where an employer's liability is limited to scope of employment, rather than the full array of vicarious liability

Restatement's recognition that scope of employment and apparent authority are distinct theories of vicarious liability.

Primeaux nonetheless argues that under South Dakota law the doctrine of scope of employment "includes both actual and apparent authority." Like the panel majority, Primeaux relies for this proposition on the Supreme Court of South Dakota's opinion in Leafgreen. In that case, the Court held that an insurance company was not vicariously liable when its former employee used information obtained while employed as defendant's agent to burgle an insured's home. The Court began its analysis by reciting the doctrine of apparent authority -- "a principal may be held liable for fraud and deceit committed by an agent within his apparent authority, even though the agent acts solely to benefit himself." 393 N.W.2d at 277. It then quoted portions of § 261 of the Restatement, which further refines when an agent's apparent authority makes the principal vicariously liable to third persons for the agent's fraud.[5] Recognizing a need to

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theories under state law. We have traditionally bridged this gap by looking to general agency principles such as the Restatement. See United States v. Farmer, 400 F.2d 107, 109-110 (8Th Cir. 1968).

[5]As the Primeaux I panel majority observed, 102 F.3d at 1462, the tortious misconduct of employee Scott in this case is more directly addressed in § 265 of the Restatement rather than the fraud provisions in § 261. The Restatement

limit the extent of apparent authority liability for criminal misconduct, and following the lead of courts in other jurisdictions, the Court then borrowed the concept of foreseeability found in § 231 of the Restatement, one of the provisions dealing with scope of employment. For an employer to be vicariously liable under the apparent authority doctrine, the Court concluded, "the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." Id. at 280-81. Applying that standard to the facts in Leafgreen, the Court held the insurer not liable for its agent's burglary.

As subsequent South Dakota cases demonstrate, the fact that Leafgreen borrowed the scope of employment foreseeability factor in applying the doctrine of apparent authority does not mean that the Supreme Court of South Dakota now considers apparent authority to be a part of the scope of employment inquiry. Less than one year after Leafgreen , the Court decided Deuchar, where a ranch hand negligently shot a visitor to the ranch while hunting. The

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expressly lists the apparent authority provisions of § 261 and § 265 as two of the situations "in which, a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment." RESTATEMENT OF AGENCY 2D § 219, cmt. e.

Court analyzed Deuchar under the scope of employment doctrine, quoting Restatement § 229 for the relevant standard. 410 N.W.2d at 180 n.2. The Court explained that an employer is not liable "for the acts of a servant who has embarked upon a 'frolic' of his own with no underlying purpose of furthering his master's business," but the scope of employment question becomes more difficult "when a servant acts for dual purposes, that is, to serve the master and to further personal interests." Citing Leafgreen, the Court "adopted the foreseeability test for determining when a servant's acts are within the scope of employment." Id. at 181.

Leafgreen and Deuchar applied the same foreseeability test, but they did not intermingle the two distinct theories of vicarious employer liability -- scope of employment and apparent authority. In two more recent decisions, the Supreme Court of South Dakota has maintained this analytical distinction. McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 194-95 (S.D. 1991), was an insurance agent fraud case; like Leafgreen, it was analyzed under the doctrine of apparent authority. More significantly, South Dakota Public Entity Pool for Liability v. Winger, 566 N.W.2d 125, 128-29 (S.D. 1997), involved an insurance coverage issue that turned on scope of employment. The Court applied the traditional scope of employment analysis of Deuchar, rather than the apparent authority analysis of Leafgreen.

Primeaux has failed to cite any case that imposed

FTCA liability solely because the victim of an intentional tort relied upon a federal employee's apparent authority. The Restatement distinguishes between scope of employment and apparent authority as theories of vicarious liability. South Dakota law generally follows the Restatement. The Supreme Court of South Dakota has long recognized that vicarious liability for conduct within the scope of employment is based upon the employment relationship, whereas vicarious liability for conduct within an agent's apparent authority is based upon estoppel. Recent South Dakota cases have linked the discrete analyses with a common foreseeability element while continuing to recognize two distinct legal theories. In these circumstances, we agree with the government that the panel majority in Primeaux I and Primeaux II erred in applying the South Dakota doctrine of apparent authority to determine whether Officer Scott was acting within the scope of his employment for FTCA purposes when he raped Lesa Primeaux.

II.

The remaining question is whether the district court erred in finding that the rape of Primeaux was not within the scope of Scott's employment as a tribal officer, applying the traditional South Dakota scope of employment standard. At the outset, we note some uncertainty whether we should review this question under the clearly erroneous or the *de*

novo standard of review.[6] We put this question aside, however, because the district court's judgment must be affirmed under either standard.

In oral findings and conclusions at the end of trial, the district court summarized the scope of employment standard

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[6]The Supreme Court of South Dakota considers scope of employment a question of fact for the jury. See Deuchar, 410 N.W.2d at 181. At least one circuit reviews FTCA scope of employment findings for clear error. See Duffy v. United States, 966 F.2d 307, 314 (7th Cir. 1992). The Supreme Court called FTCA scope of employment the "determination of a fact" in Lamangno, 515 U.S. at 424, but more recently commented in another context, "scope of employment ultimately expresses a conclusion not of fact but of law." Faragher, 118 S. Ct. at 2287. Calling this a mixed question of fact and law still leaves the standard of review in doubt. See, e.g. Smith v. Equitable Life Assur. Society, 67 F.3d 611, 616 (7th Cir. 1995), noting the Seventh Circuit has "moved decisively" toward clear error review of all mixed questions of fact and law based upon recent Supreme Court decisions such as Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990). Perhaps reflecting this confusion, the panel majority reviewed the district court's scope of employment determination for clear error in Primeaux I, 102 F.3d at 1460, but reviewed the apparent authority determination *de novo* in Primeaux II, 149 F.3d at 898-99, 901.

in Deuchar and then compared this case with two of our prior FTCA decisions applying South Dakota law. In Lushbough, an off-duty surveyor trainee borrowed a government truck and negligently caused an accident while completing personal errands. We reversed an FTCA judgment against the United States, concluding it was "too clear for argument that at the time of the accident. . . [the trainee] was not acting within the scope of his office or employment." 200 F.2d at 721. By contrast, in Red Elk v. United States, 62 F.3d 1102 (8Th Cir. 1995), an on duty police officer detained a thirteen-year-old girl for a curfew violation and raped her in the back seat of his police car. We acknowledged that this criminal conduct was done to benefit the officer personally, not his government employer, but concluded it was foreseeable that on-duty police occasionally misuse their authority in this manner. In affirming a determination that the assault was within the scope of the police officer's employment, we expressly distinguished Lushbough: "In Lushbough the agent borrowed the principal's vehicle to run a purely personal errand unconnected with the principal and had an accident. . . . There is more in our present case, however, than just using the police vehicle." 62 F.3d at 1106.

This case, the district court reasoned, "is somewhat in the middle between Lushbough and Red Elk." When he raped Primeaux, Officer Scott was using a government car for authorized travel, but he was unarmed, out of uniform, and off duty, insofar as his law enforcement responsibilities were

concerned. Indeed, he was outside his jurisdiction. Scott gave Primeaux a ride because she was stranded far from town late on a cold night -- the kind of assistance any citizen might offer -- not to detain her as part of his law enforcement duties. Noting that Scott's act of sexual assault was obviously not in furtherance of his government mission, the court determined that the assault "was committed while Mr. Scott was on a frolic of his own and not acting in the course or scope of his employment."

If scope of employment is a finding of fact, this finding is not clearly erroneous. Treating scope of employment as a mixed question of fact and law reviewable *de novo*, we agree with the district court's conclusion. Red Elk and recent cases from other jurisdictions have concluded it is sufficiently foreseeable to a government employer that on-duty police officers will occasionally misuse their authority to sexually assault detainees. But this case is far different. The connection between Officer Scott's government employment and his sexual assault of Primeaux was simply too remote and tenuous to be foreseeable to his employer. In the words of Leafgreen, it was conduct "so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business."

The judgment of the district court is affirmed.

LAY, Circuit Judge, dissenting, with whom WOLLMAN,

Chief Judge, McMILLIAN, RICHARD S. ARNOLD, and MURPHY, Circuit Judges, join.

The court's opinion is directly contrary to the holding of the United States Supreme Court in Williams v. United States, 350 U.S. 857 (1955). In addition, the court now sets a new precedent not only in this circuit, but throughout the United States, in departing from uniform interpretation of federal law.[1] The court now finds that regardless of state law as to vicarious liability, Congress has limited liability under the FTCA to a wooden interpretation of "scope of employment."[2]

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[1]All of the circuits including this court have held that liability of the United States may be imposed under the Federal Tort Claims Act ("FTCA") if a private employer would be liable under state law respondeat superior where the wrongful conduct took place. See Tonelli v. United States, 60 F.3d 492, 495 (8Th Cir. 1995); Rodriguez v. Sarabyn, 129 F.3d 760, 766 (5th Cir. 1997); Richman v. Straley, 48 F.3d 1139, 1145 (10Th Cir. 1995); Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991); James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); United States v. Farmer, 400 F.2d 107, 109 (8Th Cir. 1968); O'Toole v. United States, 284 F.2d 792, 794 (2d Cir. 1960).

[2]The court specifically holds: "Thus, even if state law extends a private employer's vicarious liability to employee

In Tonelli v. United States, 60 F.3d 492 (8Th Cir. 1995), this circuit included "apparent authority" within the terms of "scope of employment" under the FTCA. The court's holding in the instant case appears to be in direct conflict with the holding in Tonelli, in which this court, applying Iowa law in an FTCA case, reversed summary judgment granted in favor of certain postal workers. The district court had found that the employees were not acting within the scope of employment when they pilfered some mail from the plaintiff's mailbox. In the section entitled "scope of employment," this court held that a genuine issue of material fact existed as to whether the postal employees acted within their apparent authority as defined by Iowa law. The court in Tonelli held:

> The Tonellis agree that opening and copying first class mail addressed to another person generally falls outside of the scope of a postal worker's employment. . . . This determination, however, does not end our inquiry. "'The fact that the servant's act is expressly forbidden by

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conduct not within the scope of employment, the government's FTCA liability remains limited to employee conduct within the scope of employment, as defined by state law. That is the situation we encounter in this case."

> the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do, but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment.'" Vlotho, 509 N.W.2d at 354 (quoting W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 70 at 502 (5th ed. 1984)).

Tonelli, 60 F.3d at 495 (emphasis added).[3]

This court denies compensatory damages to a young

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[3]Other courts of appeals have also recognized that "scope of employment" can include apparent authority. For example, in Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995), the Fourth Circuit stated "under common law agency principles an employer is also liable for an employee's wrongful acts, even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment." Martin, 48 F.3d at 1352. See also Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (applying common law agency principles and holding that "an employer is liable. . . if the supervisor uses his actual or apparent authority to further the harassment. . .").

woman who was unmercifully assaulted and raped by a United States police officer. After her car careened into a ditch, Ms. Primeaux was stranded on a cold winter night on a deserted stretch of highway in the middle of her reservation. The officer approached her in a police car with its red lights flashing, thereby displaying his badge of authority, and offered her a ride. The officer had been authorized to travel in the police car on an expense-paid trip to and from the State of New Mexico. He drove Ms. Primeaux to an isolated spot, ordered her out of the car, and raped her. The en banc court urges that the officer was not acting within the scope of his employment and that the United States was immune from liability under the FTCA.

In two trials and on two appeals, the government, with all its legal resources, has never claimed that the statutory phrase "scope of employment" as used in the FTCA limits the law of respondeat superior as adopted by South Dakota law. In addition, the government never raised its alternative claim that even if state law applied to its fullest extent, under South Dakota law the doctrine of apparent authority cannot be considered in measuring whether an employee was acting within the scope of employment. The first time the government raised these defenses was in its suggestion for rehearing en banc after the second appeal, after the dissent on

that appeal had raised them for the first time.[4] It is

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[4]The government claims that it is permitted to raise these issues for the first time on appeal because they affect this court's subject-matter jurisdiction. It argues that the FTCA is only a limited waiver of the government's sovereign immunity and that this court has no jurisdiction to impose liability under the FTCA for acts of government employees outside of the scope of employment. I would agree that the issue of sovereign immunity can be raised at any time because it is a jurisdictional issue. United States v. Johnson, 853 F.2d 619, 622 n.7 (8Th Cir. 1988). The specific issue in this case, however, is not whether we have jurisdiction to impose liability outside the scope of employment, but rather is what constitutes scope of employment under South Dakota law. This is not an issue of sovereign immunity, but simply a question of state law relating to the doctrine of respondeat superior. Because this is not a jurisdictional issue, the government is barred from raising it for the first time in its petition for rehearing. Lacy v. Lockhart, 697 F.2d 271, 272 (8Th Cir. 1983); United States v. State of South Dakota, 665 F.2d 837, 841-42 (8Th Cir. 1981).

The Supreme Court stated in Hormel v. Helvering, 312 U.S. 552 (1941), that the rule providing that a party cannot raise an issue for the first time on appeal is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order

understandable that the government did not heretofore rely on these defenses at trial and on the two appeals. There is no law which supports them. In fact, the law is universally to the contrary.

First, it is clear that the phrase "scope of employment" in the FTCA does not limit the state law of respondeat superior. See Tonelli, supra. In fact, this argument was expressly rejected by the United States Supreme Court in Williams v. United States, 350 U.S. 857 (1955). In the lower court opinion, Williams v. United States, 215 F.2d 800 (1954), the Ninth Circuit interpreted the phrase "scope of

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that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Helvering, 312 U.S. at 556. This rule applies unless it would result in a "plain miscarriage of justice." Id. at 558. This is not such a case. In fact, by allowing the government to argue this belated issue, there will be a plain miscarriage of justice with respect to Ms. Primeaux, the victim in this case. The arguments should, therefore, be considered waived.

As Justice Scalia has so appropriately observed: "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J. concurring).

employment" within the FTCA as equivalent to "acting in line of duty" when applied to a member of the military forces. It reasoned that Congress had thus limited the rule of respondeat superior. The circuit court observed:

> If Seabourn was not acting in line of military duty at the time he injured appellant, the rule of respondeat superior (as applied in orthodox "master and servant" cases) loses its standardized force for that rule has been modified in the significant manner here noted. We need not stress the fact that when the sovereign waives its immunity from suit, it may, as here, do so on its own terms.

Williams, 215 F.2d at 808 (emphasis added). This is the same reasoning used by this court today. Nonetheless, the United States Supreme Court summarily vacated the Ninth Circuit opinion with the terse admonition: "This case is controlled by the California doctrine of respondeat superior." Williams, 350 U.S. at 857.

The court's position that the government's liability does not follow the common law of respondeat superior applied by the state where the wrong takes place ignores the mandate of Congress that says "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a

private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1994)(emphasis added).[5] Furthermore, the legislative history of the FTCA supports the fact that the court's narrow interpretation of scope of employment is misguided. When the FTCA was originally enacted in 1946, there was an

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[5]The court's position also ignores the statutory terms of 28 U.S.C. § 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1994) (emphasis added).

exclusion for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Federal Tort Claims Act § 421 (1946). This section was amended, however, in 1974 to provide that "investigative or law enforcement officers" can be held liable for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."[6] 28 U.S.C. § 2680(h)(1994). According to the court's strict, literal interpretation of scope of employment, these acts would not be included. Congress intended, however, to include these intentional torts within the liability of the government. It is evident from the legislative history of the

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[6]This subsection defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) (1994). The dissent on the second appeal made the argument that the BIA officer in this case was not acting within the scope of employment because he was not effecting an arrest. This is clearly incorrect as section 2680(h) only serves to define "investigative or law enforcement officer" and not to limit the definition of scope of employment. If anything, this section viewed in connection with the legislative intent supports the broad interpretation of scope of employment that I discussed above.

FTCA and, more importantly, from the Supreme Court itself that scope of employment is defined by the fullest extent of state respondeat superior law.

The court urges an alternative argument: the state law of South Dakota does not recognize that scope of employment includes the rule on apparent authority. Although this argument was never raised by the government at trial or in the two prior appeals, the government now adopts this reasoning.

The court depends on the "unless" language included in the Restatement (Second) of Agency § 219(2)(d)[7] as

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[7]South Dakota has adopted the Restatement (Second) of Agency. See e.g., Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d. 275, 280 (S.D. 1986) (relying on section 261 of the Restatement (Second) of Agency); Dahl v. Signer, 474 N.W.2d 897, 903 (S.D. 1991) (adopting Restatement (Second) of Agency § 217C).

The Restatement (Second) of Agency § 219(2)(d) provides:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in

support for its contention that apparent authority and scope of employment are two different theories. This overlooks the controlling law of South Dakota relating to the doctrine of respondeat superior. Under South Dakota law, apparent authority is an exception to scope of employment and is therefore part of the doctrine of respondeat superior.[8] Furthermore, contrary to the court's opinion, South Dakota is not the only state that includes apparent authority within scope of employment analysis.[9] As we stated in the second

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accomplishing the tort by the existence of the agency relation.

[8]This is true in other contexts. For example, the final judgment rule is a statutory rule allowing an appeal only from a final judgment. That is the general rule, but there are exceptions to that rule such as interlocutory appeals, extraordinary writs, and the collateral order rule. In order to understand the rule itself, the exceptions become part of the rule.

[9]See Sports Car Centre of Syracuse, Ltd. v. Bombard, 672 N.Y.S.2d 201, 203 (N.Y. App. Div. 1998) (stating that "[a]n employer may be vicariously liable for conversion by an employee where the employee is acting within the scope of his apparent authority") (citations omitted); Borg-Warner Protective Serv. Corp. v. Flores, 955 S.W.2d 861, 866 (Tex. Ct. App. 1997) (noting that "under common-law agency

panel decision:

> The dissent also overlooks that South Dakota law has recognized that the distinction between actual authority and apparent authority simply pertains to the manner in

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principles, an employer is liable for an employee's wrongful acts, even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment") (citation omitted); Rickborn v. Liberty Life Ins. Co., 468 S.E.2d 292, 296 (S.C. 1996) (acknowledging apparent authority and stating "a general agent's authority is determined by the nature of the business, and is coextensive with his scope of employment. . ."); Leitch v. Switchenko, 426 N.W.2d 804, 806 (Mich. Ct. App. 1988) (stating that "[l]iability under this doctrine may also be based on a finding that the employee was acting within the apparent scope of his employment"); Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991) (stating that federal courts have held that "where an employee is able to sexually harass another employee because of the authority or apparent authority vested in him by the employer, it may be said that the harasser's actions took place within the scope of his employment") (citations omitted).

which an agent obtains authority. See Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700, 701 (S.D. 1988). "Actual authority is created by manifestations from the principal to the agent, . . . while ostensible [or apparent] authority is created when the principal allows a third person to believe the agent has authority to act on the principal's behalf." Id. (citations omitted).

"[I]n the measurement of its effects, authority is authority and the operation of apparent authority is of no lesser degree of effectiveness than is the operation of real authority." See Harold Gill Reuschlein & William A. Gregory, Handbook on the Law of Agency and Partnership 58 (1979). Where apparent authority exists, the third person has the same rights with reference to the as where actual authority exists. See Restatement § 8 cmt. a.

Primeaux v. United States, 149 F.3d 897, 902 n.10. (emphasis added).

This circuit also has recognized that under South Dakota law foreseeability is "central" to the analysis, and is determined by the nexus between the agent's employment and

the activity which causes the injury. Red Elk v. United States, 62 F.3d 1102, 1102-3 (8Th Cir. 1995). In Red Elk, this court found the government liable under the FTCA where there was misuse of power by a tribal police officer who raped a thirteen-year-old child while the officer was on duty. The court in Red Elk relied on the South Dakota Supreme Court case of Leafgreen v. American Family Mutual Ins. Co., 393 N.W.2d 275 (S.D. 1986), which stated:

> We think it fairly stated that a principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.

Leafgreen, 393 N.W.2d at 280-81.[10]

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[10]The South Dakota Supreme Court also observed in Leafgreen:

> One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a

We discussed the foreseeability of the officer's actions in our first panel opinion in this case:

> [W]hile it is unfortunate and uncommon, sexual misconduct by an officer is in some

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> generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the later sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [citations omitted] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.

Leafgreen 393 N.W.2d at 280 (quoting Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 148-49 (Cal. Ct. App. 1975)).

> circumstances reasonably foreseeable. It is no less foreseeable that such an abuse of authority could occur while the officer is not technically on duty, but rather possesses the apparent authority sufficient to cause a person to rely on or fear that authority and succumb to sexual advances. Cases holding employers liable for sexual assaults or excessive use of force by police officers reason that such conduct is foreseeable because of the unique position of trust held by such officers.

Primeaux v. United States, 102 F.3d. 1458, 1463 (8Th Cir. 1996) (citation omitted) (emphasis added).

In the second case, the panel commented:

> A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is unquestionably the case because of the position of such officers in our society.

Primeaux, 149 F.3d at 900-01 (quoting Red Elk, 62 F.3d at 1107).

There should be little doubt that Officer Scott while traveling the highway that evening was acting under the express authority of the BIA. As he approached Ms. Primeaux, (1) he was authorized to travel in the police car during an expense-paid trip to and from New Mexico, (2) Scott turned on his red lights atop the police car, (3) he told Ms. Primeaux he was a BIA officer, (4) Ms. Primeaux testified she followed Scott's command to get out of the car because he was a "cop," and (5) the trial court found that Scott accomplished the tort by the existence of his agency relationship.

As we previously observed:

> Viewing this evidence through the eyes of the victim, we deem it obvious that any ordinary citizen would believe under similar circumstances that an officer of the law had stopped to render assistance.
>
> The fact that the victim was not arrested, involuntarily stopped or detained is barely relevant under these circumstances. An officer's duty is not limited solely to the arrest and apprehension of law violators. An officer of the law often displays his apparent or actual

> authority to offer assistance to citizens, especially those in distress. Any citizen, especially on a "dark, cold night in the middle of nowhere" would take more assurance in and place greater reliance on assistance offered by an officer of the law than by a complete stranger.

Id. at 899.[11]

The officer was also within the "scope of employment" even as narrowly defined by the court. The officer was authorized to travel to a training session in New Mexico. During his return trip, he was receiving per diem and mileage. He was authorized to drive his assigned police car with red lights affixed on top. He testified that he thought it part of his duties to offer a stranded motorist a ride. Ms. Primeaux testified that Officer Scott approached her and turned on his red lights on the police vehicle. The district court found all of these facts to be true.[12] To hold that Officer

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[11]The evidence is undisputed that there was reliance by Ms. Primeaux upon his apparent authority, or that he was aided in accomplishing the tort by the existence of the agency relation. See Restatement of Agency § 219(2)(d).

[12]The district court found Ms. Primeaux's version to be true. In fact, it held Ms. Primeaux's testimony "much more credible than that of Mike Scott." Trial Tr. at 251.

Scott, under these circumstances, was not acting within the scope of his employment is inexplicable.[13] The district court concluded, however, that the officer was not within his scope of employment because he was outside of his territorial jurisdiction and was not on duty for law enforcement purposes. This finding was a clear error of law. The fact that the officer was not in his jurisdiction does not mean he was outside his scope of employment at the time he offered Ms. Primeaux a ride. The officer obviously was operating a government vehicle under the authority of the BIA. As in Red Elk, it was foreseeable that he would stop and offer assistance to a stranded motorist. It was also foreseeable that he would commit an act of violence upon this motorist. The law is clear that even though a government employee commits an intentional tort, that employee can still be acting within the scope of employment, as was the case here. See Red Elk, 62 F.3d at 1107-08.

Under either theory, the undisputed record in this case

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[13]Assume Officer Scott had an accident with another vehicle while driving the police car back to Rosebud that evening, there could be little question that he would be found, as a matter of law, to be acting within the scope of his employment. Scott was authorized to go to the training session, drive the government car, authorized to use a government credit card for the trip and paid his salary while on the trip.

shows that the government should be held liable, and it is a manifest injustice to hold otherwise.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
FIRST PANEL DECISION

United States Court of Appeals
FOR THE EIGHT CIRCUIT

No. 96-1470

Lesa M. Primeaux, formerly known as Lesa M. Lamont, formerly known as Lisa M. Bad Wound, Plaintiff-Appellant	*
v.	* Appeal from the United States District Court for the
United States of America, Defendant-Appellee.	* District of South Dakota.

Submitted: October 21, 1996
Filed: December 26, 1996

Before WOLMANN, LAY, and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

I.

In this appeal, Lesa Primeaux seeks damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(a), 2671 et seq. (FTCA), arising from a sexual assault by Bureau of Indian Affairs (BIA) police officer Kenneth Michael Scott. On November 9, 1991, at approximately 1:00 a.m., Primeaux, then twenty-one years old, was driving on a South Dakota highway. While she was trying to turn her car around, it became stuck in a snowbank. After an unsuccessful attempt to free her vehicle, she began walking toward the nearest town of Martin, South Dakota.

Scott, driving a white government vehicle with a police light bar on top, came upon Primeaux's car and stopped to see if anyone needed assistance. Finding no one, he drove toward Martin. He then saw Primeaux walking along the road, and stopped to ask her whether she wanted a ride. She accepted and got in the front seat of the car. After driving a very short distance, Scott pulled off the highway, ostensibly to go to the bathroom. The district court made the following factual findings as to the subsequent events: Scott asked Primeaux to exit the vehicle, and told her to do what he said. He then grabbed her, unzipped her jeans, pulled her by the hair, and committed an act of sexual penetration. He also

attempted oral intercourse with Primeaux.[1]

At the time of the assault, Scott was wearing clothing Primeaux reasonably could have mistaken for a police uniform. Scott's government car had no markings on either side, but had a police light bar on the roof, a police radio inside, and government license plates. Scott was traveling back from Arizona, where he had attended a training session that was paid for by the government, as were his travel expenses. In addition, he did not use leave time to attend the session but was on "travel status," continuing to draw his BIA salary.

Primeaux testified she was fearful Scott would arrest her for drinking and driving, though she acknowledged he did not threaten to arrest her or ask her if she had been drinking. Scott was a police officer on the Rosebud reservation in South Dakota. Both Primeaux's car mishap and the assault occurred outside the reservation. Scott testified he merely "stopped to help an individual"; he "wasn't in uniform or in duty capacity." Scott was unarmed.

The district court found that a sexual assault occurred

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[1]At trial, it was the government's position that the act was consensual, while Scott testified Primeaux was the aggressor in the encounter. The district court made a credibility determination and found that under South Dakota law, Scott had sexually assaulted Primeaux. That finding is not appealed.

under South Dakota law, but that Scott was not acting within the scope of his employment as a BIA officer. It therefore issued judgment in favor of the United States. Since the government does not cross appeal on the finding of sexual assault, the sole issue before us is whether, under South Dakota law[2] Scott's actions were within the scope of his BIA employment.

II.

Primeaux urges us to review the district court's application of South Dakota scope of employment law de novo. South Dakota law is clear, however, that an application of this test is a question of fact. McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 195 (S.D. 1991). This court reviews questions of fact under a clearly erroneous standard, and questions of law de novo. See Brazzel v. United States, 788 F.2d 1352, 1355 (8Th Cir. 1986) ("Although the choice of the appropriate rule . . . is a matter of law, a district court's findings on the application of that rule are findings of fact and will not be disturbed unless clearly erroneous.").

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[2] Neither party disputes that in an action brought under the FTCA, whether a government employee's act is within the scope of employment is a determination governed by state law. Forrest City Mach. Works, Inc. v. United States, 953 F.2d 1086, 1088 n.5 (8Th Cir. 1992).

III.

The district court, pursuant to oral findings of fact and conclusions of law given at trial, relied primarily upon three distinct points of law in determining the scope of employment test to be used in this case. First, it recited the factors listed in Restatement (Second) of Agency § 229 and adopted by the South Dakota Supreme Court in Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D. 1987).[3]

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[3]The Deuchar court quoted from § 229 in relevant part:

> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> > (a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

Second, it discussed the foreseeability test set out in Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986). The rule governing scope of employment, as put forth in Leafgreen, is that "a principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury." Id. at 280. Foreseeability is governed by the

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> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
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> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

Deuchar, 410 N.W.2d at 180 n.2 (quoting Restatement (Second) of Agency § 229).

following standard: "[T]he employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." Id. at 280-81. The district court here repeated both of these principles. Trial Tr. at 254-55.

Third, the district court recognized the importance of Red Elk v. United States, 62 F.3d 1102 (8Th Cir. 1995), as the closest case factually to the case at bar applying South Dakota law to reach its decision. In Red Elk, this court affirmed an assessment of liability against the government for damages resulting from the rape of a thirteen-year-old girl by an on-duty tribal police officer. Id. at 1103-04, 1108. After a thorough analysis of South Dakota scope of employment cases, this court determined first that "'[f]oreseeability' is central to the analysis under the South Dakota rule," and second that it was foreseeable this police officer would violate the position of trust his employment provided and sexually assault the victim. Id. at 1107. The district court distinguished Red Elk by noting that under the facts presented here, Scott "was not on duty for . . . enforcement purposes," was not armed, was outside of his jurisdiction, and was not picking up Primeaux for any violation of law. Trial Tr. at 259. The court thus concluded that Scott was not acting within the scope of his employment for vicarious liability purposes. Id. at 259.

Red Elk, Leafgreen, and Deuchar, in addition to other cases applying South Dakota law, all seem to be in agreement

that foreseeability is the linchpin of the South Dakota scope of employment test.[4]

IV.

Our review of South Dakota respondeat superior law convinces us that the district court did not apply the South Dakota test in its entirety. By failing to recognize principles of apparent authority under South Dakota law as applied in cases such as the one at bar, the court may have been misled in finding that Scott's criminal assault was not foreseeable as

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[4]See, e.g., Red Elk, 62 F.3d at 1107 ("'Foreseeability' is central to the analysis under the South Dakota rule stated in Leafgreen."); Davis v. Merrill Lynch, Pierce, Fenner & Smith, 906 F.2d 1206, 1222 n.19 (8Th Cir. 1990) (quoting South Dakota cases holding that "liability will be imposed upon the principal when the nexus is sufficient to make the resulting harm foreseeable" and then applying this principle); McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 195 (S.D. 1991) (articulating and applying the foreseeability test); Olson v. Tri-County State Bank, 456 N.W.2d 132, 135 (S. D. 1990) (same) ; Deuchar, 410 N.W. 2d at 181 ([T]his Court has adopted the foreseeability test for determining when a servant's acts are within the scope of employment."); Leafgreen, 393 N.W.2d at 280 (adopting the reasoning of a California Court of Appeals which articulated and refined the foreseeability test).

being within the scope of his employment. The district court appears to hold that since Scott was outside of his jurisdiction not serving in a law enforcement capacity, the government cannot be held liable under vicarious liability principles. The difficulty we have with the district court's determination is that it fails to take into account the doctrine of apparent authority inherent in respondeat superior law. Here, the officer was on limited duty driving a police car equipped with a police radio and government plates, and was wearing clothing lending an appearance of a police officer in uniform. The victim was concerned she would be arrested. The BIA has certainly provided the officer with the cloak of authority so that a third person such as Primeaux could reasonably assume the officer was carrying out his official duties.

In Leafgreen, the South Dakota Supreme Court applied Restatement (Second) of Agency § 261, which discusses apparent authority as it relates to fraud. Leafgreen, 393 N.W.2d at 277. The analogous section of the Restatement relating to tortious wrongdoing reads as follows:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was

> reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (2) (d) . Section 265(1) of the Restatement gives the general rule for apparent authority, which is that "[a] master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority." Restatement (Second) of Agency § 265(1). South Dakota cases consistently articulate respondeat superior law as including principles of apparent authority. See Leafgreen, 393 N.W.2d at 277 ("Under general rules of agency law, a principal may be held liable for fraud and deceit committed by an agent within his apparent authority, even though the agent acts solely to benefit it himself."); McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 194 (S.D. 1991) ("Generally, a principal may be held liable for the fraud and deceit of his agent acting within the scope of his actual or apparent authority, even though the principal was unaware of or received no benefit from his agent's conduct.") (citing Dahl v. Sittner, 429 N.W.2d 458, 462 (S.D. 1988)) ; see also State v. Hy-Vee Food Stores, Inc., 533 N.W.2d 147, 149 (S.D. 1995) (discussing vicarious criminal liability and noting, "Well settled is the basic principle that criminal

liability for certain offenses may be imputed to corporate defendants for the unlawful acts of its employees, provided that the conduct is within the scope of the employee's authority whether actual or apparent") Siemonsma v. David Mfg. Co., 434 N.W.2d 70, 73 (S.D. 1988) (relying on Restatement (Second) of Agency § 265(1)); cf. Baldwin v. National College 537 N.W.2d 14, 18 (S.D. 1995) (discussing ostensible agency generally); Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700, 701 (S.D. 1988) (same). We find the Restatement to be consistent with South Dakota law, and where, as here, a case is one of first impression, South Dakota is guided in part by the Restatement. Leafgreen, 393 N.W.2d at 277.[5] Therefore, we read South Dakota law to hold the employer vicariously liable not only for foreseeable tortious wrongs committed pursuant to the employee's actual authority, but also for those committed when apparent authority of the employee "puts him in a position where his harmful conduct would not be 'so unusual or startling that it would be unfair to include the loss caused by the injury

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[5]As this court pointed out in Davis, "Leafgreen does not mandate that Restatement of Agency rules be adopted where the Restatement is at variance with the related South Dakota precedent." 906 F.2d at 1222 n.18. Where, however, as here, the Restatement is in accordance with South Dakota law, we believe its principles guide the South Dakota courts.

among the costs of the employer's business.'" Olson v. Tri-County State Bank, 456 N.W.2d 132, 135 (S.D. 1990) (quoting Leafgreen, 393 N.W.2d at 280-81) (emphasis added). Foreseeability necessarily includes not only instances of use or abuse of actual authority, but also of use or abuse of apparent authority. Under these governing principles, the district court's finding that Scott's assault was not foreseeable because he was not acting within the scope of his actual authority--that is, exercising law enforcement duties--was too narrow.

In Red Elk, this court noted that while it is unfortunate and uncommon, sexual misconduct by an officer is in some circumstances reasonably foreseeable.[6] 62 F.3d at 1107. It is no less foreseeable that such an abuse of authority could occur while the officer is not technically on duty, but rather possesses the apparent authority sufficient to cause a person to rely on or fear that authority and succumb to sexual advances. Cases holding employers liable for sexual assaults or excessive use of force by police officers reason that such conduct is foreseeable because of the unique position of trust held by such officers. See Mary M. v. City of Los Angeles, 814 P.2d 1341, 1352 (Cal. 1991) (holding a police officer

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[6]The Red Elk court also noted that "[c]ases like this stigmatize respected police officers who in rendering vital public work surely outnumber the errant officers." 62 F. 3d at 1107. That sentiment is worth repeating here.

liable for a sexual assault because he took "advantage of his authority and control as a law enforcement officer"); White v. County of Orange, 166 Cal. App. 3d 566, 571, 212 Cal. Rptr. 493, 496 (Cal. Ct. App. 1985) (holding that a police officer could have acted within the scope of his employment when he stopped a motorist and sexually assaulted her, and noting that "the police officer carries the authority of law with him into the community . . . [and] the officer's method of dealing with this authority is certainly incidental to his duties"); Applewhite v. City of Baton Rouge, 380 So.2d 119, 122 (La. Ct. App. 1979) (finding employer liability for a police officer's sexual abuse of a woman in his custody, and noting "where it is found that a law enforcement officer has abused the 'apparent authority' given such persons to act in the public interest, their employers have been required to respond in damages"). It is equally likely that this trust is relied upon when officers appear to be exercising their authority, especially because of the 'on-call' nature of their employment. See Osborne v. Lyles, 587 N.E.2d 825, 831 (Ohio 1992) (reversing summary judgment for the city in a case of excessive force used by an off-duty police officer at an accident scene in part because the officer was to "be considered on duty at all times, for purposes of discipline") ; Daigle v. City of Portsmouth, 534 A.2d 689, 699 (N.H. 1987) (holding the city liable for an of- duty police officer's assault because the employment-related activities of employees who have an "obligation, or at least the option, to perform official

duties whenever the need may arise" are considered within the scope of their employment).

Here, it is possible that Scott was aided in his assault of Primeaux by the existence of the agency relation. See Restatement (Second) of Agency § 219 (2)(d). If Scott accomplished his objective by using his status as a police officer, and if Primeaux relied on his position in succumbing to his advances, then his conduct may fall within the doctrine of apparent authority. See Restatement (Second) of Agency § 265. The district court failed to make a finding as to this possibility or recognize apparent authority as a part of South Dakota respondeat superior law. Accordingly, we remand to the district court for reconsideration of its factual findings with application of South Dakota law relating to apparent authority.

WOLLMAN, Circuit Judge, dissenting.

The district court found that Ms. Primeaux submitted to Scott's demands out of fear and intimidation arising from Scott's apparent position of authority as a police officer and as one who appeared to have the power to carry out his commands. The district court's finding that it was not foreseeable that Scott would use his status as a police officer to commit the acts that he did at the time and place that he did includes, in my view at least, the implicit finding that Scott's exercise of apparent authority in the circumstances of this

case could not have been within the scope of his employment. What more the district court could and should have found with respect to Scott's position of apparent authority, I do not know. However reprehensible Scott's actions, I do not believe that the district court's findings are clearly erroneous, and thus I would affirm the judgment.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SECOND PANEL DECISION

United States Court of Appeals
FOR THE EIGHT CIRCUIT

No. 97-2691

Lesa M. Primeaux, formerly known as Lesa M. Lamont, formerly known as Lisa M. Bad Wound, Plaintiff-Appellant	*
v.	* Appeal from the United States District Court for the
United States of America, Defendant-Appellee.	* District of South Dakota.

Submitted: April 15, 1998
Filed: July 27, 1998

Before LOKEN and LAY, Circuit Judges, and P RATT,[1]

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[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

District Judge.

LAY, Circuit Ridge.

This matter arises out of a suit against the United States under the Federal Tort Claims Act (FTCA) seeking damages for sexual assault by a Bureau of Indian Affairs (BIA) police officer. This is the second time the case has been before this court. See Primeaux v. United States, 102 F.3d 1458 (8Th Cir. 1996) (Wollman J., dissenting).

At the time of the assault in November 1991, Lesa Primeaux, the victim, was a 21-year-old Native American whose car had become stuck in a snowbank on a rural South Dakota highway.[2] The district court initially found Primeaux was walking toward the town of Martin on a cold night when Kenneth Scott, a BIA officer from the Rosebud Reservation, approached her in his police car. Scott was driving a white government vehicle with a police light bar on top under BIA authority outside the reservation. He was returning from a police training session in New Mexico. Scott offered to give Primeaux, a ride, which she accepted. He subsequently drove off a side road, assaulted and raped her. This suit followed.

The district court originally denied vicarious liability on the ground that the police officer was not acting within the

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[2]The detailed facts of this case are set forth in our previous opinion, Primeaux, 102 F.3d at 1460.

scope of his actual authority since he was outside his jurisdiction. App. at 259. The district court concluded that because the officer was not acting within his actual authority, there was not a sufficient nexus under state law to demonstrate the foreseeability of the assault. On appeal, this court found the district court had failed to consider the government's liability under the doctrine of apparent or ostensible authority.[3] Primeaux, 102 F.3d at 1462. We reversed and remanded to the district court. Id. at 1463.

On remand, the district court expressly considered the law of apparent authority, but once again found there was an insufficient nexus between the assault and the scope of the officer's either actual or apparent authority. Primeaux v. United States, No. 94-5048, slip op. at 9-10 (D.S.D. June 4, 1997). Primeaux once again appealed. She now argues that the findings of the district court are mixed questions of fact and law and that this court must review the district court's second decision de novo. The government on the other hand urges this court to apply the clearly erroneous standard. We

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[3]The South Dakota Supreme Court points out that "[a]pparent authority is analogous to 'ostensible' authority which is defined in SDCL 59-3-3 as authority 'such as a principal intentionally, or by want of ordinary care, causes or allows or allows a third person to believe the agent to possess.'" Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 277 n.4 (S.D. 1986).

find that although the district court discussed the doctrine of apparent authority, it nevertheless failed to properly apply this doctrine as set forth under South Dakota law.[4] In doing so, we find that the trial court erred as a matter of law.

I. Apparent Authority

Restatement (Second) of Agency ("Restatement") as adopted by the South Dakota Supreme Court requires that, in applying the rule of apparent authority, a court must view the agent's conduct through the eyes of the victim rather than from the agent's point of view. See Leafgreen, 393 N.W.2d at 280 ("Under section 261 and the theory of apparent authority, however, the agent's conduct is seen through the eyes of the third party."); see also American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982) (quoting Restatement (Second) of Agency § 261, comment a, p. 571); Grease Monkey Int'l, Inc. v. Montoya, 904 P.2d 468, 475 (Colo. 1995) (same); Freeman v. Royal Shield Entertainment Inc., 411 So.2d 559, 561 (La.

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[4]We deem it noteworthy and relevant to the factual circumstances of this case that S.D. Codified Laws § 59-6-3 (Michie 1993) reads: "A principal is bound by acts of his agent under ostensible authority, to those persons only who have in good faith, and without negligence, incurred a liability or parted with value upon the faith thereof"

Ct. App. 1982) ("One must look from the viewpoint of a third person to determine if apparent agency has been created."). Therefore, in this case, the inquiry should have been whether, from Primeaux's viewpoint, being approached by an officer whose police car lights are flashing would make a reasonable person believe that the officer was acting within the scope of his employment as a police officer.

The district court concluded that the officer had not exercised apparent authority partly because the court was not convinced the "police vehicle had anything to do with the assault which later takes place." Primeaux, No. 94-5048, slip op. at 10. The district court's analysis on this point slights the South Dakota law that requires ostensible authority to be viewed through the eyes of the third person. The undisputed facts show that, after the officer stopped his police car in the lane across from the victim, he turned on the red flashing police light bar on the top of his vehicle. Id. at 3. Furthermore, the victim stated it appeared to her that the officer was wearing a police jacket when he approached her. App. at p. 28. The victim's reliance on Officer Scott's display of his badge of authority, i.e., the red flashing lights, is rejected in part by the district court because the officer testified that he stopped to offer a ride as an individual and not as an officer. Id. at p. 134. The district court specifically found "that the officer was not purporting to act on behalf of the government by stopping, detaining or arresting plaintiff for any violation of law." Primeaux, No. 94-5048, slip op. at

page 8.

The difficulty we have with this analysis is that it ignores the objective, undisputed fact that the police lights were turned on when the officer approached the victim. The district court erroneously accepted, contrary to South Dakota law, the officer's stated intentions without consideration of the victim's reliance on the fact that the officer had turned on the flashing red lights of the police car. Viewing this evidence through the eyes of the victim, we deem it obvious that any ordinary citizen would believe under similar circumstances that an officer of the law had stopped to render assistance.

The fact that the victim was not arrested, involuntarily stopped or detained is barely relevant under these circumstances. An officer's duty is not limited solely to the arrest and apprehension of law violators. An officer of the law often displays his apparent or actual authority to offer assistance to citizens, especially those in distress. Any citizen, especially on a "dark, cold night in the middle of nowhere" would take more assurance in and place greater reliance on assistance offered by an officer of the law than by a complete stranger.

The district court also discounted Primeaux's stated reliance on Scott's apparent authority because it found her reliance lacked "credibility." The district court did not fault

Primeaux's believability,[5] but rather found that she voluntarily accepted the ride "to escape the elements." But once again, this discussion fails to view the conduct of the officer through the eyes of the victim when he turned on his red police lights and specifically told her that he was a BIA police officer.

The district court also concluded that the events leading to the assault were not relevant because, it reasoned, the existence of apparent authority need be determined only at the time Primeaux, voluntarily entered the officer's car. The district court concluded that after Primeaux got into Scott's police car, "there was little or no action she could have taken once she entered the vehicle." Primeaux, No. 94-5048, slip op. at 8. The district court therefore focused its analysis only "at the point plaintiff entered the front seat of the vehicle." Id. We find this to be an erroneous view of the law as well.

In evaluating the question of ostensible authority, the district court must review the totality of the events from the time the officer turned on his police car lights to the time of the assault. See McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 195 (S.D. 1991) (whether an agent acted within the scope of apparent authority is to be determined from all

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[5]In fact, in the first case, the district court found that Primeaux was more credible, than Officer Scott. App. at p. 251.

the circumstances of the transaction); Dahl v. Sittner, 429 N.W.2d 458, 462 (S.D. 1988) (same). The district court concluded that Primeaux submitted to the assault because of Scott's overpowering physical presence. However, this ignores Primeaux's statement that when Scott stopped and directed her to get out of the car, she believed he was a "cop." In considering the totality of circumstances, one cannot ignore the finding of the district court that:

> [O]n a cold winter night in [the] middle of practically nowhere near the Indian reservation, and a person who appeared to be an officer, a person with a strong personality such as the Court observed, picking up a strange and submissive type of personality from the roadway, is an authoritative figure as must have been presented to her, leaves (sic) the Court to no other conclusion that he faced a situation -- she faced a situation through the use of force, coercion, or threats with the apparent -- with his overriding presence accompanied by an apparent power of execution.

App. at p. 252 (emphasis added). Based on the foregoing, we conclude that the district court failed to properly apply the principles of apparent or ostensible authority in accordance

with South Dakota law.

II. Foreseeability

The district court found that because Scott was not acting within the scope of his apparent or actual authority, the assault was not foreseeable. As the South Dakota Supreme Court has acknowledged, the issue of foreseeability as to vicarious liability is distinct from the issue of foreseeability in negligence cases.[6] Here, the question is whether the

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[6]In Leafgreen, the court observed:

> One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the later sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it

agent's employment put him in a position of trust where harmful conduct to a third party would not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business. Leafgreen, 393 N.W.2d at 280-81. We find our statement in Red Elk controlling here:

> A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is

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> would seem unfair to include the loss resulting from it among other costs of the employer's business. [citations omitted] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. Leafgreen, 393 N.W.2d at 280 (quoting Rodgers v. Kemper Const. Co., 124 Cal. Rptr. 143, 148-49 (Cal. Ct. App. 1975)).

> unquestionably the case because of the position of such officers in our society.

Red Elk v. United States, 62 F.3d 1102, 1107 (8Th Cir. 1995) (quoting AppleWhite v. City of Baton Rouge, 380 So.2d 119, 121 (La. Ct. App. 1979).[7]

In cases involving scope of employment, although the factual issues must be resolved, the ultimate holding turns on state respondeat superior and agency law. Here, the factual

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[7] This court emphasized a similar observation in the first appeal:

> [W]hile it is unfortunate and uncommon, sexual misconduct by an officer is in some circumstances reasonably foreseeable. . . . It is no less foreseeable that such an abuse of authority -- could occur while the officer is not technically on duty -- but rather possesses the apparent authority sufficient to cause a person to rely on or superiority and succumb to sexual advances. Cases holding employers liable for sexual assaults or excessive use of force by police officers reason that such conduct is foreseeable because of the unique position of trust held by such officers. Primeaux, 102 F.3d at 1463 (citations omitted) (emphasis added).

issues are no longer in dispute. The only remaining question is whether under the facts found by the district court, the BIA will be liable as a matter of law for Scott's assault. We find as a useful analogue Justice Souter's analysis in the recent sexual harassment case, Faragher v. City of Boca Raton, 66 U.S.L.W. 4643 (June 30, 1998).[8] The Court relied on the Restatement § 219(d) in stating:

> an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless. . .the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

66 U.S.L.W. at 4650.

In the present case, there is little doubt the officer

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[8]The Supreme Court also observed in Faragher: "In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law." 66 U.S.L.W. at 4649.

purported to speak on behalf of the BIA (who authorized his journey): (1) Scott turned on his red lights atop the police car, (2) Scott told Primeaux he was a BIA officer, (3) Primeaux testified she followed Scott's command to get out of the car because he was a "cop," and (4) the trial court found that Scott accomplished the tort by the existence of his agency relationship.[9] We therefore vacate the judgment of the district court with directions to enter judgment as to liability for the plaintiff; the cause is remanded to the district court for a determination of damages."[10]

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[9]As set forth, the district court observed "his overriding presence accompanied by an apparent power of execution" allowed him to carry out his assault. On the basis of this finding, Judge Wollman observed in his original dissent that Ms. Primeaux. submitted to Scott's demands out of fear and intimidation arising from Scott's "apparent position of authority as a police officer and as one who appeared to have the power to can out his commands." Primeaux, 102 F.3d at 1463-64 (Wollman J.,dissenting) (emphasis added).

[10]We need pause only briefly in response to the dissent. It should be noted that the government has never asserted before the trial court or this court the new theories presented in the dissent. First, the dissent overlooks that South Dakota law (the place of the wrong) defines the standards by which "scope of employment" is to be measured.

As Judge Loken earlier observed in writing this court's opinion in Brownv. Armstrong: "Under the FTCA, the law of the place of the alleged tort governs the scope of employment question." 949 F.2d 1007, 1012 n.7 (8Th Cir. 1991). See Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L.Ed. 761 (1955); see also 28 U.S.C. § 2674 (1996) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, ...").

South Dakota cases have adopted the Restatement which defines scope of employment to include both actual and apparent authority. See Restatement §§ 219(2)(d) and 265(l); see also Leafgreen, 393 N.W.2d at 277; McKinney v. Pioneer Life. Ins. Co., 465 N.W.2d at 194. It has been early and universally recognized that although actual authority and apparent authority exist as two different theories of vicarious liability, they both may serve to define scope of employment. See William L. Prosser, Handbook of the Law of Torts 473 (3rd Ed. 1964); see also Faragher, 66 U.S.L.W. at 4649 (citing Seavey, Speculations as to "Respondeat Superior," in Studies in Agency 129, 155 (1949) ("The liability of a master to a third person for the torts of a servant has been widely extended by aid of the elastic phrase 'scope of the employment' which may be used to include all which the

court wishes to put into it.")).

The dissent also overlooks that South Dakota law has recognized that the distinction between actual authority and apparent authority simply pertains to the manner in which an agent obtains authority. See Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700, 701 (S.D. 1988). "Actual authority is created by manifestations from the principal to the agent, while ostensible [or apparent] authority is created when the principal allows a third person to believe the agent has authority to act on the principal's behalf " Id. (citations omitted).

"[I]n the measurement of its effects, authority is authority and the operation of apparent authority is of no lesser degree of effectiveness than is the operation of real authority." See Harold Gill Reuschlein & William A. Gregory, Handbook on the Law of Agency and Partnership 58 (1979). Where apparent authority exists, the third person has the same rights with reference to the principal as where actual authority exists. See Restatement § 8 cmt. a.

The idea that a law enforcement officer's actions were intentional and thereby outside the scope of employment has been previously rejected by this court, See Red Elk, 62 F.3d 1102 (applying South Dakota law under the FTCA), and other

LOKEN, Circuit Judge, dissenting.

I respectfully dissent for two independent reasons.

1. The Federal Tort Claims Act (FTCA) allows claims:

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] *while acting within the scope of his office or employment,* [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC v. Meyer, 510 U.S. 471,477 (1994) (emphasis added). The Act does not make the government liable to the full extent of a private employer's vicarious liability under state law. Rather, the United States is liable only if its employee was acting "within the scope of his office or employment." 28 U.S.C. §§ 1346(b)(1), 2672; See Piper v. United States, 887 F.2d 861, 863 (8Th Cir. 1989). As the Supreme Court has

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courts. See, e.g., Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 216-221, 814 P.2d 1341, 1349-1352 (Cal. 1991).

said, "'Scope of employment' sets the line." Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 423 (1995).[11] The FTCA is a limited waiver of the government's sovereign immunity. We have no jurisdiction to impose FTCA liability for the acts of government employees outside the scope of their employment. Meyer, 510 U.S. at 475.

In our prior decision, we remanded "for reconsideration of [the district court's] factual findings with application of South Dakota law relating to apparent authority." Primeaux, v. United States, 102 F.3d 1458, 1463 (8th Cir. 1996). Our opinion noted that Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986), had discussed apparent authority as it relates to agent frauds, and we quoted Restatement (Second) of Agency § 219(2)(d), which relates more generally to agent wrongdoing:

> (2) A master is not subject to liability for the torts of his servants *acting outside the scope of their employment*, unless:
>
> (d) the servant purported to act or to speak on behalf of the

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[11]Because Primeaux did not assert claims against Scott personally, the Attorney General made no determination under 28 U.S.C. § 2679(d)(1) regarding the scope of employment issue.

> principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

102 F.3d at 1462 (emphasis added). In other words, we invoked that portion of South Dakota law which authorizes the imposition of vicarious liability on private employers for acts of their agents that are within their apparent authority but outside the scope of their employment. Now, the case has returned, once again with a district court finding that Tribal Officer Scott was acting outside the scope of his employment. The court again reverses, declaring that the United States is liable because, from Primeaux's perspective, Scott was acting within his apparent authority as defined in the Restatement. This ruling goes beyond the goverment's waiver of sovereign immunity.

Scope of employment and apparent authority are two different theories of vicarious liability. See Commerford v. Olson, 794 F.2d 1319, 1321 (8Th Cir. 1986). Neither Leafgreen nor McKinney v. Pioneer Life Ins. Co., 465 NW.2d 192, 194 (S.D. 1991), supports the court's assertion that all acts done with apparent authority are within an employee's scope of employment under South Dakota law. The foreseeability of the employee's misconduct from the

employer's perspective is critical to the scope of employment issue under South Dakota law, whereas apparent authority focuses on the employee's misconduct from the victim's perspective. As § 219(2)(d) of the Restatement expressly recognizes, apparent authority is a doctrine tinder which an employer may become liable for torts committed by employees acting outside the scope of their employment.

State law may of course extend a private employer's vicarious liability to include acts within an employee's apparent authority but not within the scope of employment. But FTCA liability requires proof that Scott's actions were within the scope of his employment as a tribal officer. Under South Dakota law, scope of employment is an issue of fact. See Deuchar v. Foland Ranch. Inc., 410 NW.2d 177, 181-82 (S.D.1987). The district court found that Scott was not acting within the scope of his employment. That finding is not clearly erroneous. Scott was off duty, not in uniform, and outside his jurisdiction. Primeaux was out of her car, "walking toward the nearest town of Martin," when Scott "stopped to ask her if she wanted a ride." Primeaux, 102 F.3d at 1460. He offered her a ride, the kind of assistance any citizen might offer late on a cold November night. Primeaux accepted the offer because she wanted a ride. Scott's subsequent sexual assault was by no stretch of the imagination a foreseeable event within the scope of his employment. See Bates v. United States, 701 F.2d 737, 742 (8Th Cir. 1983)) (military policeman's on-duty murder and

rape of four civilians following purported stop not within scope of government employment); Leafgreen, 393 N.W.2d at 281 (judgment for employer affirmed because "there was not such a connection between [the agent's] employment . . . and the burglary which actually caused the harm as to make the harm foreseeable").

2. The FTCA does not apply to "[a]ny claim arising out of assault, battery," and other enumerated intentional torts. 28 U.S.C. § 2680(h). Rape and other sexual assaults are within the classes of intentional torts excepted from the FTCA by § 2680(h). See Garcia v. United States, 776 F.2d 116, 118 (5th Cir. 1985); Doe v. United States, 838 F.2d 220, 226 (7th Cir. 1988) (Manion, J., dissenting, and cases cited). Thus, the intentional tort committed by Tribal Officer Scott is not within the customary parameters of the FTCA.

The exception in § 2680(h) is subject to a proviso:

> *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this

> subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Though Tribal Officer Scott is no doubt a law enforcement officer for purposes of § 2680(h), the proviso only applies to intentional torts committed by such officers " while executing a search, seizing evidence, or making an arrest." Pooler v. United States, 787 F.2d 868, 872 (3d Cir.), cert. denied, 479 U.S. 849 (1986); accord Cole v. United States, 874 F. Supp. 1011, 1046 (D. Neb. 1995); Employers Ins. v. United States, 815 F. Supp. 255, 258 (N.D. Ill.. 1993); Beran v. United States, 759 F. Supp. 886, 892 (D.D.C. 1991); Rourke v. United States, 744 F. Supp. 100, 103 (E.D. Pa. 1988), aff'd, 909 F.2d 1477 (3d Cir. 1990); Contra Harris v. United States, 677 F. Supp. 403, 406 (W.D.N.C. 1988); Crow v. United States, 659 F. Supp. 556, 570 (D. Kan. 1987). Scott was not engaged in those kinds of activities at the time in question, so the proviso to § 2680(h) is inapplicable.

Most cases construing § 2680(h) have involved the question whether the United States may be liable for negligent acts that somehow facilitated or contributed to intentionally tortious wrongdoing that otherwise falls within the exception. See, e.g., Sheridan v. United States, 487 U.S. 392 (1988). In this case, only intentional tort claims are

asserted. Accordingly, those claims are barred by § 2680(h). Red Elk v. United States, 62 F. 3d 1102 (8Th Cir. 1995), is not precedent for ignoring the limit on the government's waiver of sovereign immunity set forth in § 2680(h). Our opinion in Red Elk never mentions § 2680(h), no doubt because the tribal officers in Red Elk raped the victim after arresting her for a curfew violation, which likely made the proviso to § 2680(h) applicable. Indeed, it is not clear from that opinion whether the government was held liable for its agents' intentional torts or the government's negligent failure to train and supervise those agents.

For both of the foregoing reasons, I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION
BENCH RULING AT TRIAL

The Court finds that this action is brought by the plaintiff under the Federal Tort Claims Act, 42 United States Code Section 2671 et seq., and 28 United States Code Section 1346(a).

The Court finds that this case arises out of an incident which occurred in the early morning hours of November 9, 1991, at Bennett County, South Dakota, approximately one mile west and one-half mile north of Martin, South Dakota, off of United States Highway 18. United States Highway 18 is the main highway which runs east -- generally east and west through the portions of the Rosebud Sioux Indian Reservation and the Pine Ridge Sioux Indian Reservation in the southwest part of South Dakota. Highway 18 intersects Pine Ridge Village in Shannon County, traverses across Bennett County where Martin is located. The distance, approximate distance from Pine Ridge Village to Martin is approximately 35 miles. The nine-mile corner which was referred to in the testimony is located nine miles to the west of Martin at an intersection of Highway 2, State Highway 2, which goes north to Allen about 8 miles. The small Indian village of Swett is a few miles west of the nine-mile corner. In Shannon County north and a little west or a little east of Pine Ridge Village are three small Indian communities: one is Manderson, the other is Wounded Knee, the other one is Porcupine. Those three villages are approximately 20 miles from Pine Ridge Village. Consequently, a trip from either Manderson, Porcupine, or Wounded Knee to Martin would be

a distance of approximately 40 miles.

The Court finds that the incident in this case occurred in the vicinity of the nine-mile corner, a few hundred feet north of the Highway 18. The Court finds that the defendant United States -- correction. The Court finds that the plaintiff has filed an administrative claim with the Department of Interior Bureau of Indian Affairs and accordingly, since that claim is denied, the Court does have jurisdiction under this Federal Tort Claims Act. The incident of which the plaintiff makes complaint occurred outside the boundaries of either the Pine Ridge Indian Reservation or the Rosebud Reservation in an area where officer Scott had no jurisdiction to make arrests for violation of either tribal or federal law.

At about 9 o'clock on the evening before, the plaintiff left her place of residence to go to the local bar for the purpose of attending some type of a dance. She stayed in the bar until about midnight, three hours. She had drunk between six to eight cans of beer. The Court observes that she is a person of about a weight of 120 pounds. She left with three strangers whom she met there. They lived at Pine Ridge. Went to her trailer home to get her car keys and her car. Once they dropped her off, they left. She came out of her house trailer, went around the block to perhaps find these folks, and since they had left without telling her she got in the car and headed west towards the nine-mile corner and on Highway 18. Her intentions were either to go to Allen north of Highway 18 and north of the nine-mile corner or on to Pine

Ridge Village, or perhaps other villages within the reservation. Her testimony indicates that she was somewhat undecided as to her final destination.

In any event, her vehicle got stuck in the snow close to the place where the incident occurred. She had decided to turn around and go back home. The Court, of course, is entitled to make findings of fact based upon not only express evidence, but also inferences naturally flowing from that evidence. It was a cold night in November. She tried momentarily to get the car out of the snow. She rocked it back and forth as best she could and not being able to free the car, she waited in the car for a short period of time. She didn't want to walk back to Martin, but she eventually decided to leave the vehicle and head for Martin, a distance of just a couple three miles -- couple or three miles. As she was walking down the highway in an easterly direction, a car came along which stopped in the opposite lane. The car was a white vehicle owned by a governmental agency used for law enforcement purposes. It had a light bar on top of it. It was being driven by Mr. Mike Scott, a law enforcement officer employed by the governmental agency. Mr. Scott got out of the car and asked if she needed help. She recognized the car as a police vehicle and it was her opinion that he was in uniform, although the evidence indicates that he was not in uniform, but may have had clothing on which would have made her reasonably believe that he was in uniform. He offered to give her a ride to Martin. At that time he made no

offer to pull out her vehicle. She got in the car, passenger side. In a few yards, perhaps half a block or block or so, even Mr. Scott cannot to this day find the exact point at which he turned off, his testimony is that he had to go to the bathroom, so he pulled off to the area perhaps a hundred yards or so north of the highway. The Court finds that the defendant -- that the plaintiff did not know Scott, never seen him before, although he did tell the plaintiff his name, that he was a police officer, he said he was a Rosebud cop, and that he had just got back from Arizona at a training area and dropped off a gentleman at Pine Ridge. The fact is that had been on a trip to Arizona to attend a training seminar for instructors who are engaged in physical training. In observing Officer Scott, he appeared to the Court and the Court does then find that he appears to be about a male about 5 feet 11 inches in height, and/or perhaps a little taller; he appears to weigh about 185 pounds and appears to the Court to be in excellent physical condition. Indeed, the instruction which he attended was for the purpose of physical fitness. The Court does find that although he is an enrolled member of the Rosebud Sioux Tribe, visually he appears to be more Caucasian -- that is white -- than an Indian person.

The plaintiff appeared to be about 120 pounds, she is slight of build, perhaps 5 feet 3 or 4 inches tall; she, from all appearance, is about a 25 or 6 year old Indian lady, who was born February 14, 1970. She was 21 years of age at the time of this incident and attended school to the 9th grade, but does

have a General Educational Development certificate. She has been married, the mother of four children, divorced from her husband in 1992. She has since remarried.

Some of the facts and circumstances of the actual incident itself are unclear in the small details as one would expect from the circumstances of the incident itself, late at night, approximately 1 o'clock.

By the Court's assessment of the evidence, plaintiff was in Martin for three hours. She started at 9, left at midnight, she went home, she went towards Pine Ridge Village, got stuck in the snow, waited for a short period of time, and then went to the site of the place where the incident occurred. So if one would assume, as one could reasonably do, that another hour went by, this would be approximately 1 o'clock in the morning.

So having left the scene of the stuck vehicle with the intention to take the plaintiff to Martin, he turned off the highway, as the Court had indicated, for the professed purpose of relieving himself. The Court in the assessment of the credibility determinations which it is required to make in these types of cases, does find that the intention to turn off the highway for the purpose of relieving himself, the Court finds that it's a fair and reasonable finding that that was pretextural. Mr. Scott indicated that he had originally gone to the bathroom in Pine Ridge or where he stopped to let off an associate. At the most, he was on the road to cover 40 miles or so, perhaps 40 minutes, and he was only a few miles,

indeed only two or three miles from Martin. The Court simply does not believe Mr. Scott when he said that the real purpose for him leaving the highway was for his own personal problem. Once having stopped the vehicle he got out of the vehicle and asked that Ms. Lamont also exit the vehicle. The Court finds that he said to Ms. Lamont, now Primeaux, to do what he said. She stated that she was scared, she didn't know what was going to happen. He came around the back. I don't know what was going to happen. She again said she was scared, and that Mr. Scott grabbed her. He was standing in front and he started unzipping her jeans. He pulled her pants down, her jeans down by her side, and she may have assisted him by reason of the fact that she was fearful, and felt intimidated by Mr. Scott. The Court finds that he pulled her by the hair, she fell down on the ground, and before doing that, he committed an act of sexual penetration.

It is stipulated by counsel that there was indeed penetration of the vaginal area. When he then attempted oral intercourse with her, she again was scared. He grabbed her by the hair, it was cold, indeed the act of intercourse took place without a removal of her jeans or underclothing, but the jeans or underclothing had been- - and there's some question as to whether she had any underclothing on; the Court is unable to make that determination -- but by inference the Court would find that she undoubtedly had the normal female undergarment. The jeans were taken down to her ankles or at

least to her knees, and the sexual penetration took place outside the car up against the car in that general configuration. After the oral intercourse or perhaps the attempted oral intercourse, Ms. Primeaux got up, pulled her pants up, and zippered her coat; she got back in the car like she was told to do. Even at that time she didn't know where Mr. Scott was going to take her. She went and started back to the highway and they went back to the car. Mr. Scott testified that they went back to the car to remove the car from the highway, perhaps to keep it from being in a position of which would be dangerous to other travelers on the highway. He could have done this. He could have attempted to move that car in the first instance and that's one of the reasons why the Court feels that he picked up the victim and that as a pretext, took her off the highway and committed the act of which the Court finds took place.

After the act was completed, then he decided perhaps the car ought to be removed from the highway, a thought which should have occurred to him before he took her for his own personal purposes, so nonetheless he went back to the vehicle and he saw another vehicle coming. That vehicle turned out to be a vehicle driven by the witness that appeared in this case, Anthony DeLucia. The Court finds that the testimony of Anthony DeLucia is of particular credibility in this case. I will cover that in a few moments.

At any rate, finding out that the vehicle was stuck and offering assistance, they started to and were successful in

extracting the vehicle from the snow bank and moved it to a position of safety of others. During this period of time, practically immediately upon the arrival of DeLucia, Ms. Lamont did tell him not to leave her with Scott and in order to convince Scott that DeLucia was the responsible person to take this young lady, he said he was the uncle of Ms. Lamont. She at that time thought that this was her chance to get away and that's why she talked to DeLucia.

There are discrepancies in the testimony of both parties, both principals in this case, a situation that the Court is used to seeing in highly contested matters involving personal conduct of the parties. The situation that occurred was one which the Court finds was completely intimidating to this victim. She had been drinking; indeed, she was under the influence of intoxicating liquors. The six, seven or eight drinks, the beers that she had over a space of three hours, definitely could have placed her at a limit in excess of that which under the State of South Dakota is presumed to be intoxication, especially since she was slight of build. In general, the Court believes that Ms. Lamont -- her testimony was much more credible than that of Mike Scott.

(Mr. Scott left the room.)

THE COURT: Mr. Scott was searching through this testimony to justify his actions. He would have the Court believe that this 21-year-old Indian lady, who was obviously a very submissive and passive personality, was the aggressor, a position which I find not credible in this case. on a cold

winter night in middle of practically nowhere near the Indian reservation, and a person who appeared to be an officer, a person with a strong personality such as the Court observed, picking up a strange and submissive type of personality from the roadway, is an authoritative figure as must have been presented to her, leaves the Court to no other conclusion that he faced a situation -- she faced a situation through the use of force, coercion, or threats with the apparent -- with his overriding presence accompanied by an apparent power of execution. Indeed he did admit to the fact that she had fallen to the ground, but he dismisses his own conduct in that, necessarily generally consist of the Court's findings of fact.

Now, as to the conclusions of law. The Court must apply the law of the forum that is the law of South Dakota as it applies to this case. South Dakota Codified Law 22-22-1 defines rape as follows: rape is an act of sexual penetration accomplished for any person under any of the following circumstances. Subparagraph 2. Through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence accompanied by apparent power of execution.

In the case of State v. Havens, 264 N.W.2d 918 South Dakota 1978, the Court made some observations as follows. At page 921, the Supreme Court of South Dakota said that, "Liability is imposed where the victim submits out of 'fear' of violence without requiring that the fear be reasonably grounded, pointing out that one who takes advantage of a

victim's unreasonable fear of violence should not escape punishment any more than a swindler who cheats gullible people by false statement which they should have found incredible." Further, the Court said in head note one on that same page, "That the terminology accomplished through the use of force, coercion, or threats is sufficient to demonstrate compulsion. Such implied element of compulsion still gives rise to the necessity for resistance more than token unless before or when offered the victim is subjected to fear of violence." Of course, recognize that sexual intercourse by consenting adults is not a violation of law.

Then in the case of State v. Blalack, 434 N.W.2d 55 South Dakota 1988, the Supreme Court, at page 60, after setting forth certain rules relating to the evaluation of evidence said that, quote, "He" -- the defendant -- "argues, however, the victim consented to these acts. We note that a lack of consent in a rape case need not be established by physical resistance." The element of compulsion, citing cases, including the Havens case which I cited. The element of compulsion can be satisfied by showing that the victim submitted out of fear of violence or injury. The Court finds in this case -- has found in this case that the victim Lamont did submit out of fear and intimidation by Mike Scott, as counsel have indicated in final argument; however, this is not the end of the argument.

The Court must make a determination as to whether or not the conduct was conduct committed within the scope and

course of the employment in order to hold the government liable under Red Elk. Accordingly, the Court does examine the South Dakota law as applied to this issue of scope of employment. If Leafgreen v. American Family Mutual Insurance Company, 393 N.W.2d 275, South Dakota 1986, under head note 3, the Court said that we think it fairly stated that a principal is liable for tortious harm caused by agents where a nexus sufficient to make a harm foreseeable exists between the agent's employment and the activity which actually caused the injury. Foreseeability -- I'm sorry. Foreseeable is used in the sense that the employee's's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the cost of the employer's business.

In the examination of the South Dakota law, the Court cites a case of Deuchar v. Foland Ranch, Incorporated, 410 N.W.2d, 177, South Dakota case. In that case it was a deer hunting case in which an employee shot the plaintiff who was hunting on Foland's land; Foland had a policy against hunting on the ranch without permission and no permission had been given in this case. It was held that the genuine issue of fact existed as to whether Anderson was acting within the scope of his employment precluding summary judgment. The Court held that Anderson was not in the scope of employment. Now, that case is important in this regard: the case stated it is universally recognized that a master is liable for injuries to the personal property of third persons caused by the

negligence of his employee when such negligence occurred within the scope of employment, citing cases, stating that the phrase, quote, "Was within the scope of his employment," end quote, has been called vague but flexible, referring to those acts which are closely connected with what the servant is employed to do and so fairly reasonably and incidental to it that they may be regarded as methods, even though quite improper ones, of tearing out the objectives of the employment. The Court said that there are numerous factors which should be considered. Generally if an act is connected either directly or indirectly where the business of employer, listed in footnote 2, these factors are as follows:

> "1. To be within the scope of employment, conduct must be of such of the same general nature of what -- must be in the same general nature of that authorized or incidental to the conduct authorized.
>
> "2. In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized to be within the scope of employment, the following matters of fact are considered.
>
> > "(a) Whether or not the act is one commonly done by servants." Incidentally, this is a citation to restatement section 229.
> >
> > "(b) The time, place, purpose of the act.
> >
> > "(c) The previous relations between the master and the servant.

"(d) The extent to which the business of the master is apportioned between different servants.

"(e) Whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant.

"(f) Whether or not the master has reason to expect that such act will be done.

"(g) The similarity and quality of the act done to the act authorized.

"(h) Whether or not instrumentality by which the harm is done has been furnished by the master to the servant.

"(i) The extent of departure from the normal method of accomplishing an authorized result; and.

"j) Whether or not the act is seriously criminal."

The Court then cited Leafgreen and Red Elk. I'm sorry. Deuchar was cited by the Eighth Circuit in Red Elk. No useful purpose would be served for the Court to go into the facts and circumstances of Red Elk. They are very clear. The Court is very knowledgeable about Red Elk. Indeed, as indicated by counsel, I sat on the case involving the criminal case of United States v. Claymore, but the Supreme Court

also decided in 1990 the case of Olson v. Tri-County State Bank 4586 N.W.2d 132, and then the 1990 case of Davis v. Merrill Lynch, 906 F.2d 1206, Eighth Circuit 1990. And interesting to note that Red Elk also referred to the case of United States v. Lushbaugh, 200 F.2d 717, Eighth Circuit 1959. In Lushbaugh it was held that if the harm comes from some independent purpose of the agent, then the principal is not liable. In Lushbaugh the agents borrowed the principal's vehicle to run a purely personal errand, unconnected with the principals and had an accident. The case of Mary M v. City .of L.A., -- and that citation is 285 California Reporter 99, 814 P.2d 1341, 1991 California case, and AppleWhite v. ,City of Baton Rouge, 380 Southern 2d. 119 Louisiana, 1979 have been cited. But since these cases are so fact-sensitive, the Court does not pay much attention, indeed does not consider Mary M, AppleWhite, in the decision which the Court is now making.

In the case under consideration there was no duty, in fact, no requirement that Officer Scott stopped and picked up the plaintiff on the highway. Employment of Mike Scott did not provide him with an opportunity. This was not the case in Red Elk where Claymore was discharging his duty by picking up a 13-year-old victim for a curfew violation. Furthermore, Officer Scott was outside his area of jurisdiction. True, he only had instrumentality which was in the vehicle which permitted him the opportunity to commit this act and as shown in Lushbaugh, that is not sufficient.

Accordingly, while the Court does in fact as it must consider very seriously Red Elk, there are some major differences between Red Elk and this case. In Red Elk, it was a law enforcement officer, tribal officer in uniform on duty on a reservation charged with a enforcing curfews. The victim was picked up for the violation for which Red Elk was responsible to enforce. He was armed, he was driving a clearly marked police vehicle, and he was in the company of a fellow police officer. In this case, Mike Scott indeed was a law enforcement officer. He was not on duty, but returning from duty, in the sense that he was on duty, he was not on duty for the enforcement for enforcement purposes. Indeed, he was being paid to travel so in that sense he was on duty, was off the reservation, was not enforcing any laws. He was not picking up a victim for any violation of law. He was not armed. He was driving in a marked car, that is, marked by having lights on top. This case is somewhat in the middle between Lushbaugh and Red Elk. Obviously, the act of sexual assault was not in furtherance of the duty and responsibility and mission of the government.

Accordingly, although the Court does find that there was sexual assault under South Dakota law in this case, the Court concludes that there was an assault which was committed while Mr. Scott was on a frolic of his own and not acting in the course or scope of his employment.

Accordingly, judgment will be issued in favor of the government and against the plaintiff, pursuant to this oral

memorandum of opinion. The Court will not assess costs in this case.

APPENDIX E

RELEVANT STATUTES

District Court Jurisdiction

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 4 of the Federal Tort Claims Act

28 U.S.C. § 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity,

which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

Section 10(h) of the Federal Tort Claims Act

28 U.S.C. § 2680(h)

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
APPELLANT'S (PLAINTIFF'S) PETITION
FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

APPEAL NO. 97-2691SDRC

LESA M. PRIMEAUX, formerly known as Lesa M. Lamont formerly known as Lisa Bad Wound,	)
Plaintiff/Appellant,	) APPELLANT'S PETITION FOR
vs.	) REHEARING EN BANC
UNITED STATES OF AMERICA,	)
Defendant/Appellee.	)

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and 8Th Circuit Rule 35A, the Appellant, Lesa M. Primeaux, respectfully moves this Court for rehearing en banc of this appeal as follows:

ISSUES MERITING REHEARING EN BANC

Whether an Appellee shall be allowed to raise a new issue for the first time on rehearing en banc.

Whether the South Dakota Supreme Court should first be allowed to rule whether apparent authority is part of South Dakota's overall scope of employment law or whether this Court should decide that question of state law.

PRELIMINARY STATEMENT

This case, arising under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq., has previously been before this Court on three occasions, twice for decisions by different panels of the Court, Primeaux v. United States, 102 F.3d 1458 (8Th Cir. 1996)(Primeaux I), and Primeaux v. United States, 149 F.3d 897 (8Th Cir. 1998)(Primeaux II), and once on rehearing en banc from the panel's decision in Primeaux II. Primeaux v. United States, #97-2691, June 17, 1999 (Primeaux III).

In Primeaux I the panel remanded to the district court to consider whether the conduct of the United State's officer in question was within the scope of his apparent authority. 102 F.3d at 1463. The district court ruled the officer's rape of Appellant was not accomplished within his apparent authority. Primeaux II reversed the panel holding that the officer in fact acted under the apparent authority of the United States. 149 F.2d at 901.

The dissent in Primeaux II, 149 F.2d at 902-904,

argued that apparent authority is not a legitimate part of the scope of employment analysis under the FTCA. Although the United States had never before raised this issue in any manner before the district court or in two appeals to this Court, based on the Primeaux II dissent the government petitioned the Court for rehearing en banc so it could argue the question raised by the dissent in Primeaux II. The Court granted the government's petition.

Thereupon, this Court held 6 to 5 in Primeaux III, that apparent authority was not a part of South Dakota's overall scope of employment law but rather an entirely separate theory of liability lying outside of any scope of employment analysis and, therefore, not cognizable under the FTCA. This Court, accordingly, vacated the Primeaux II decision and affirmed the judgment of the district court in favor of Appellee. Primeaux III at 10.

The judgment in Primeaux III was entered on June 17, 1999. This petition for rehearing en banc is timely under FRAP 40 being filed with forty-five (45) days of that judgment.

RELEVANT FACTS

The essential facts attendant to this appeal have been reiterated in the Court's prior decisions in this case. To summarize, a Bureau of Indian Affairs (BIA) police officer from the Rosebud Indian Reservation in South Dakota, returning from an employer authorized, work-related training

mission in New Mexico, stopped to assist Appellant, a stranded motorist, and offered to give her a ride to Martin, South Dakota.[1] Appellant accepted. While on the way to Martin the officer drove down an isolated side road and raped Appellant.[2]

The officer was driving a white BIA law enforcement vehicle with official government plates that had been assigned to him for his trip by his superior. It had a law enforcement light bar on top, which the officer used, and a police radio which he attempted to use to call for assistance. The officer's travel expenses were paid by his employer. He was traveling in a straight course from his training back to the Rosebud. The officer was not in uniform but was dressed in clothing that appeared to Appellant to be a police uniform. The officer informed Appellant that he was a BIA police officer from Rosebud.

Appellant had been drinking. She had previously been arrested by state authorities for DWI violations and was fearful she might be arrested again. Appellant testified that she succumbed to the officer's demands because he was a

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[1]The officer was not on official "patrol duty." He was outside the exterior boundaries of the Rosebud Reservation when he picked up Appellant and later raped her.

[2]The government did not appeal the district court's finding at trial that Appellant had in fact been raped by the officer.

police officer.

REASONS FOR GRANTING THIS PETITION

I.

An Appellee May Not Raise a New Issue for the First Time on Appeal.

The en banc ruling in this case directly contradicts another en banc decision by this Court issued only ten days previous to the decision in Appellant's case. In Hartford Underwriters Insurance Company v. Magna Bank, No. 97-3859, filed June 7, 1999, this Court sitting en banc, cited with approval the ruling in Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (lst Cir. 1990)(order denying rehearing), cert. denied, 498 U.S. 891, 111 S.Ct. 233, 112 L.Ed.2d 193 (1990), and held that a party who failed to assert an argument in the district court, and in supplemental briefing and oral argument before a panel of the court of Appeals, "cannot be permitted to raise a new issue for the first time on petition for rehearing in the court of appeals." Hartford at 10.

This, however, is precisely what has happened in this case. The government has been allowed by the Court to raise and argue a new issue in the court of appeals for the first time on a petition for rehearing en banc never before having argued the issue in the district court or in briefing and oral argument before two panels of this Court. Therefore, to maintain

consistency in the decisions of this Court Appellant's petition for rehearing should be granted. 8Th Cir. R. 35A(a); FRAP 40.

This Court, as well as other circuits, has consistently adhered to the rule that new issues are not to be considered

for the first time on appeal and especially not in petitions for rehearing. Hartford, supra; Tramp v. U.S., 978 F.2d 1055, 1056 (8Th Cir. 1992)(per curiam)(we do not ordinarily consider issues raised for the first time on appeal); U.S. v. South Dakota, 665 F.2d 837 (8Th Cir. 1981), cert. denied, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58; Thompson v. Calderon, 957 F.2d 1523, 1535 (9th Cir. 1992), supplemented on denial of rehr'g, cert. denied. 506 U.S. 904, 113 S.Ct. 297, 121 L.Ed.2d 221 (general doctrine of waiver applies to arguments raised for the first time on petition for rehearing); U.S. v. Bongiorno, 110 F.3d 132 (1st Cir. 1997), rehr'g denied (U.S. can not raise a new issue for the first time in a petition for rehearing); DeWeerth v. Baldinger, 38 F.3d 1266 (2nd Cir. 1994), cert. denied 513 U.S. 1001, 115 S.Ct. 512, 130 L.Ed.2d 419; Peter v. Hess Oil Virgin Islands Corp., 910 F.2d 1179 (3rd Cir. 1990); Skipper v. French, 130 F.3d 603 (4th Cir. 1997); Browning v. Navarro, 894 F.2d 99 (5th Cir. 1990); Pentax Corp. v. Robinson, 135 F.3d 760 (Fed. Cir. 1998).

II.

The South Dakota Supreme Court Should First Be Allowed to Rule on the State Law Question Whether Apparent Authority is Part of South Dakota's Scope of Employment Law.

This Court has determined an issue of state law on a

significant question of first impression in South Dakota.[3] The South Dakota Supreme Court should be given the opportunity by this Court to say what the South Dakota law is. At the very least, the question of whether apparent authority is part of South Dakota's scope of employment law should be certified by this Court to the South Dakota Supreme Court for an answer.[4]

The question, as this Court has recognized, is a close one. South Dakota has the appropriate means available to it to determine on its own this issue of state law. Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minn., 771 F.2d 1153 (8Th Cir. 1985), cert. denied, 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed.2d 301. Certification to the South Dakota Supreme Court is therefore appropriate. Perkins v. Clark Equipment Co., 823 F.2d 207 (8Th Cir. 1987) (certification appropriate if the issue is extremely close and likely to arise again); Planned Parenthood v. Miller, 63 F.3d 1452 (8Th Cir. 1995), cert. denied, Janklow v. Planned Parenthood, 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (certification to state court is appropriate when state court's construction of uncertain state law would make resolution of

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[3]Interestingly, the only member of the Court who was formerly a member of the South Dakota Supreme Court did not side with the majority's decision.

[4]Certification was previously suggested by Appellant in argument before the Court.

federal constitutional questions unnecessary).

Whether a federal court should certify a question to a state court is a matter of discretion. Johnson v. John Deere Co., 935 F.2d 151 (8Th Cir. 1991). Factors considered include most importantly the closeness of the question and the existence of sufficient state law resources to enable a principled conclusion. Also relevant "is the degree to which considerations of comity are relevant in light of the particular issue to be decided," considerations of delay and the "possible inability to frame the issue so as to produce a helpful response on the part of the state court." Florida v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976).

As noted, the state law question in this case is a close one, but one capable of being principally determined by the South Dakota Supreme Court. The issue has already been concisely framed and is capable of being helpfully resolved by the state court. It has already been nearly eight years since Appellant was raped. Any further delay resulting from certification, therefore, is of little consequence.

Finally, this case arises under the FTCA which requires that liability be decided according to the applicable law of the state where the wrongful conduct occurred. Brown v. Armstrong, 949 F.2d 1007, 1012 n.7 (8Th Cir. 1991), Primeaux III at 3. Comity, therefore, is a significant consideration. Under the FTCA federal courts are to look to and apply, not determine, the relevant state law.

Certification to the South Dakota Supreme Court will

clearly decide this case once and for all. The precedential impact of the state law decision will be significant but limited as it will apply only to FTCA cases arising in South Dakota. On the other hand, as this Court's en banc decision now stands the precedent may apply across the FTCA spectrum and, more significantly, across federal judicial forums in the Eighth Circuit generally with respect to the Court allowing the government to raise a significant new issue for the first time not only on appeal but in a petition for rehearing following two panel decisions adverse to the government.

The rule of certainty and basic, fundamental fairness to Appellant fully supports Appellant's petition for rehearing as do concerns of judicial economy and due process. Appellant has never been afforded the opportunity to fully brief the issue raised by the Primeaux II dissent and the government's previous petition for rehearing.

CONCLUSION

For these reasons and upon the above and foregoing arguments and authorities this petition for rehearing should be granted and the Primeaux III decision vacated.

Dated this 26th day of July, 1999.

/s/ Scott D. McGregor
Scott D. McGregor

VIKEN VIKEN PECHOTA LEACH
& DEWELL, LLP
Attorney for the Appellant
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
(605) 341-4400

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that he mailed twenty-one (21) copies, including the original, of the Appellant's Petition for Rehearing En Banc in the above entitled matter, together with a computer diskette containing the full text of the petition, to the clerk of the United States Court of Appeals for the Eighth Circuit by Federal Express delivery, postage prepaid, deposited at Rapid City, South Dakota, on that date next below designated, addressed as follows:

U. S. Court of Appeals
for the Eighth Circuit
U.S. Court and Custom House
1114 Market Street
St. Louis, MO 63101

Dated this 27th day of July, 1999.

/s/ Scott D. McGregor Scott D. McGregor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two (2) true and correct copies of the above and foregoing Appellant's Petition for Rehearing En Banc in the above entitled matter upon the person(s) next designated below by depositing the same in the United States mail, first class postage prepaid, at Rapid City, South Dakota 57701, in an envelop addressed to that person(s) at his last known address, namely:

Robert S. Greenspan	Diana J. Ryan
William G. Cole	Ass't U.S. Attorney
Attorneys, Appellate Staff	515 9th Street, Rm 226
Civil Division, Room 9120	P.O. Box 2893
Department of Justice	Rapid City, SD 57709-
Washington, D.C. 20530-0001	2893

Dated this 27th day of July, 1999.

/s/ Scott D. McGregor
Scott D. McGregor

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGE LAY'S PETITION
FOR REHEARING EN BANC

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 97-2691

Lesa M. Primeaux, formerly known as Lesa M. Lamont, formerly known as Lisa M. Bad Wound,	*	
Plaintiff/Appellant,	*	
v.	*	Petition for Rehearing En Banc
United States of America,	*	
Defendant-Appellee.	*	

Pursuant to Eighth Circuit Rule of Appellate Procedure 35A(b), as a judge on the en banc panel, I move for reconsideration of the court's opinion in the above entitled case.

I express a belief, based on a reasoned and studied professional judgment, that the en banc decision is contrary to the decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States,

and that reconsideration by the full court is necessary, to secure and maintain uniformity of decisions in this court.

This motion for reconsideration of the court's en banc opinion, filed as a petition for rehearing en banc, is necessary because the court's en banc opinion was decided on grounds which had not been previously raised by either of the parties.

The petition for rehearing en banc filed by Primeaux on July 28, 1999, raises the question as to whether it is proper for the en banc court to raise issues not previously raised by the United States, but fails to set forth the questions of exceptional importance I raise below.

I express a belief based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

(1) that the law of respondeat superior of the state of South Dakota governs the liability of a tortfeasor under the Federal Tort Claims Act. See 28 U.S.C. § 1346(b)(1). Liability under the FTCA is not limited by the statutory term "scope of employment," but, in fact, depends upon the law of respondeat superior of the state of South Dakota. See Williams v. United States, 350 U.S. 857 (1955); Tonelli v. United States, 60 F.3d 492 (8Th Cir. 1995) (stating that apparent authority lies within the terms "scope of employment" under the FTCA). The court's opinion is contrary to the mandate of Congress that "[T]he United States shall be liable . . . to the same extent as a private individual under like circumstances,. . . ." 28 U.S.C. § 2674 (1994).

The majority en banc opinion has created a standard of liability under the FTCA making the law for federal tort claims that occur in the seven states of the Eighth Circuit different from liability as applied in all other states. See Rodriguez v. Sarabyn, 129 F.3d 760, 766 (5th Cir. 1997); Richman v. Straley, 48 F.3d 1139, 1145 (10Th Cir. 1995); Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991); James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); United States v. Farmer, 400 F.2d 107, 109 (8Th Cir. 1968); O'Toole v. United States, 284 F.2d 792, 794 (2d Cir. 1960). It is clear from these cases that the statutory term "scope of employment" is to be measured by the law of respondeat superior of the State of South Dakota. Williams v. United States, supra.

(2) Under the undisputed facts of the case, the BIA officer was acting within the scope of his employment when he offered the plaintiff, who was stranded on a cold winter night, a ride in his BIA automobile.

(3) The overwhelming law of South Dakota as well as all other states which have passed upon the question hold that the principles of apparent authority fall within the law of respondeat superior. See Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700,701 (S.D. 1988); Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 280 (S.D. 1986). No South Dakota case law is to the contrary.

See also Sports Car Centre of Syracuse, Ltd. v. Bombard 672 N.Y.S.2d 201, 203 (N.Y.App.Div. 1998)

(stating that "[a]n employer may be vicariously liable for conversion by an employee where the employee is acting within the scope of his apparent authority") (citations omitted); Borg-Waner Protective Serv. Corp. v. Flores, 955 S.W.2d 861, 866 (Tex.Ct.App. 1997) (noting that "under common-law agency principles, an employer is liable for an employee's wrongful acts, even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment") (citation omitted); Rickborn v. Liberty Life Ins. Co., 468 S.E.2d 292, 296 (S.C. 1996) (acknowledging apparent authority and stating "a general agent's authority is determined by the nature of the business, and is coextensive with his scope of employment . . ."); Leitch v. Switchenko, 426 N.W.2d 804, 806 (Mich. Ct.App. 1988) (stating that "[l]iability under this doctrine may also be based on a finding that the employee was acting within the apparent scope of his employment"); Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991) (stating that federal courts have held that "where an employee is able to sexually harass another employee because of the authority or apparent authority vested in him by the employer, it may be said that the harasser's actions took place within the scope of his employment") (citations omitted).

Federal courts have also recognized that apparent authority falls within respondeat Superior. For example, in

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995), the Fourth Circuit stated "under common law agency principles an employer is also liable for an employee's wrongful acts, even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment." Martin 48 F.3d at 1352. See also Karibian v. Columbia Univ. 14 F.3d 773, 780 (2d Cir. 1994) (applying common law agency principles and holding that "an employer is liable . . . if the supervisor uses his actual or apparent authority to further the harassment . . .").

Although I deem it highly unusual and not a favored procedure for a judge of this court to move for reconsideration of an en banc opinion of this court, I nevertheless do so in the present case because of the deviation from settled law of the United States Supreme Court, this court and the other circuit courts of appeals. Liability under the FTCA should have the same governing principles in each circuit and to invoke a separate interpretation of such an important piece of national legislation within this circuit should not be sanctioned.

Based upon the foregoing arguments and authorities, this motion for reconsideration should be granted and the original en banc decision vacated.

Dated: July 29, 1999 /s/Donald P. Lay

Donald P. Lay, Circuit Judge

I direct the clerk of court to distribute one copy of this petition for rehearing en banc in the above-entitled matter to each of the active and senior judges of the United States Court of Appeals. I further direct that a copy of this petition be served on each of the parties in the above-entitled case.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
UNITED STATES' RESPONSE TO
APPELLANT'S AND JUDGE LAY'S
PETITIONS FOR
FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2691

LESA M. PRIMEAUX, formerly known as Lesa M. Lamont, formerly known as Lisa Bad Wound,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES' RESPONSE TO APPELLANT'S AND JUDGE LAY'S PETITIONS FOR REHEARING EN BANC

SUMMARY

The Federal Tort Claims Act (FTCA) says that the government is liable for the acts of an employee only if the employee was acting "within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). This Court ruled en

banc on June 11, 1999 that "scope of employment" does not encompass tortious acts done in South Dakota by an employee outside the scope of his employment but acting with "apparent authority." Two petitions for rehearing en banc have now been filed seeking to reverse that en banc decision by this Court. The government suggests that both petitions should be denied.

The appellant, having lost her case before this Court en banc, makes two arguments explaining why the decision should now be reversed. Neither challenges the merits of the Court's en banc decision. Instead, these arguments, even if well-founded, suggest only that, as a matter of prudential concern, the Court should have refrained from deciding the en banc case. The government suggests that neither of these two prudential arguments has any merit and states that this Court quite properly considered the issue before it and then decided the issue correctly.

Judge Donald P. Lay, a Senior Judge of this Court, has also filed a petition for rehearing en banc, citing an additional reason for reversal going to the merits of this Court's decision. The argument he makes is substantially the same as in his dissent to this Court's en banc ruling dated June 17, 1999, and does not justify rehearing the case.

a. Appellant's first argument is that the government was improperly allowed to "raise a new issue for the first time on rehearing en banc." Reh. Pet., p. 1. We have several responses to this argument. First, this Court has held

that the consideration of new issues on appeal is a discretionary matter for the Court. Singleton v. Wulff, 428 U.S. 106, 121 (1975).

Second, the government did not raise a new issue on appeal. It was Appellant who first mentioned the term "apparent authority" very briefly, in her reply brief in Primeaux v. United States, 102 F.3d 1458 (8Th Cir. 1996)("Primeaux I") and it was the panel in that case that made the "apparent authority" doctrine the basis for reversing the district court's decision. Filing a rehearing en banc petition represented the government's first opportunity to respond.

Third, as we have previously argued (Govt. Reh. Pet., pp. 7-8), the question of the statutory limits on the government's liability for the acts of an employee is a matter of sovereign immunity. Sovereign immunity is a jurisdictional prerequisite that can be raised at any stage of the litigation. See Chemin v. U.S., 149 F.3d 805, 813 (8Th Cir. 1998).

b. Appellant's other argument for reconsidering the en banc decision is her suggestion that this Court should have given the state supreme court "the opportunity . . . to say what the South Dakota law is." Reh. pet., p. 7. Once again, whether this Court certifies an issue to a state supreme court is discretionary. Johnson v. John Deere Co., 935 F.2d 151, 153 (8Th Cir. 1991). Cases are not ordinarily certified to a state supreme court unless there is genuine uncertainty about

the status of the state law. Id. In this case, the en banc Court did not find such uncertainty. In addition, as the en banc panel noted, the Supreme Court of South Dakota will never be presented with the issue raised by this case since federal courts have exclusive jurisdiction over FTCA cases. Slip Op., p. 6, n. 4.

c. In his separate Petition, Judge Lay's argument is substantive rather than prudential. Judge Lay does not agree that the FTCA should be read to limit the government's liability for employees' acts taken within the scope of their employment. He has concluded, as he did in Primeaux I and in his dissent from the June 17, 1999 en banc decision of this Court, that the United States should be liable for all acts of employees for which a private employer would be liable under the respondeat superior law of the state where the tort occurred. This argument has been adequately refuted in this Court's en banc decision.

ARGUMENT

I. THE PRUDENTIAL RULE AGAINST ALLOWING PARTIES TO RAISE A NEW ISSUE FOR THE FIRST TIME ON REHEARING EN BANC HAS NO APPLICATION IN THIS CASE.

On February 13, 1996, the district court denied FTCA

liability on the ground that the government employee accused of tortious behavior in this case was not acting within the scope of his employment. Primeaux I, 102 F.3d at 1461. On appeal, Judge Lay, writing for the panel majority, ruled that the United States could be liable for the employee's actions, faulting the district court for "fail[ing] to take into account the doctrine of apparent authority inherent in respondeat superior law." Primeaux I, 102 F.3d at 1462. This discussion was, as far as the government is aware, the first serious indication in this case that the United States could be held liable under the FTCA for an employee's action undertaken within his "apparent authority." While the Appellant had mentioned "apparent authority" briefly in her reply brief (See App't Reply Br. (May 29, 1996), p. 6), the government was not given any opportunity to brief the issue.

Although this Court has explained that, "as a general rule, we will not address arguments raised for the first time in a reply brief' (Chemin v. U.S., 149 F.3d 805, 813 (8Th Cir. 1998)), the panel did address the issue, reversed the district court's decision on the basis of that issue, and remanded the case for a determination whether the employee had, in fact, been acting within his "apparent authority" at the time of the tort.

On remand, the district court ruled that the employee had not acted under apparent authority. Nonetheless, a new panel of this Court, in a decision again written by Judge Lay, reversed that ruling as well. See Primeaux v. United States,

149 F.3d 897, 901 (8Th Cir. 1998)("Primeaux II"). In a dissent, Judge Loken challenged the previous panel's decision that "apparent authority" was a proper basis for FTCA liability. This dissent, thus, challenged squarely the correctness of the first panel's action, which the government, bound by the "law of the case" doctrine, was barred from raising in district court or before the second panel. See 13 Wright, Miller & Cooper, Federal Practice and Procedure § 4478, pp. 796-97 (1981). In its en banc petition, the government then raised the same objection to the first panel's ruling that Judge Loken's dissent had raised. The government suggests that it raised the issue properly and that the en banc Court was not prohibited from considering the question for three reasons.

First, it is clear that this Court was not be barred from considering an issue first raised on appeal even if the issue should have been raised earlier. Singleton v. Wulff, 428 U.S. 106, 121; U.S. Dept. of Labor v. Rapid Robert, Inc., 130 F.3d 345, 148 (8Th Cir. 1997).

Second, it is clear from this narrative given above that the government did not raise the "apparent authority" issue on appeal. That issue was first raised by Appellant in her reply brief. The government could not have raised its challenge to the "apparent authority" theory of liability any earlier than it did. While the prudential rules against first raising issues in the appellate court may have been breached by the actions of Appellant (See Sanchez v. Taggart, 144 F.3d 1154, 1157 (8Th

Cir. 1998)), they were not breached by the government. To prohibit en banc review, as Appellant requests, of an issue which was first raised either by the Appellant in her reply brief or by the panel itself (depending on how you view the chronology of the case) would be an obviously unfair practice. It would effectively insulate one category of panel decisions, even if "of exceptional importance" (Fed. R. App. P. 35(b)(B)), from en banc review. To have prohibited such review would be especially unreasonable in this case since the issue was previously squarely addressed by Judge Loken's dissent in Primeaux II (149 F.3d at 902-03) and by Judge Lay's five-paragraph response to that dissent. 149 F.3d at 901-02, n. 10.

In addition, as we noted in our en banc brief filed with this Court on September 9, 1999 (p. 7), the "scope of employment" requirement of 28 U.S.C. § 1346(b)(1) limits the waiver of sovereign immunity provided by the FTCA and may be raised at any stage of litigation by the parties or by the Court on its own motion. United States v. Sherwood, 312 U.S. 584, 586-87; United States v. Johnson, 853 F.2d 619, 622, n. 7 (8Th Cir. 1988).

II. THE PRUDENTIAL RULE ALLOWING FEDERAL COURTS TO CERTIFY ISSUES TO STATE SUPREME COURTS HAS NO APPLICATION IN THIS CASE.

Appellant additionally claims that the en banc Court

should not have considered the question of government liability for torts committed under its "apparent authority" until after the South Dakota Supreme Court ruled on this issue. Rehearing Pet., pp. 6-9.

In response, we note first that certifying a case to a state supreme court is not a requirement but merely a prudential decision which "rests in the sound discretion of the federal court." Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974); Perkins v. Clark Equipment Co., 823 F.2d 207, 209 (8Th Cir. 1987).

Second, as this Court explained in Shakopee Mdewakanton Sioux v. City of Prior Lake, 771 F.2d 1153, 1157, n. 2 (8Th Cir. 1985), "[a]bsent a 'close question' and lack of state sources enabling a nonconjectural determination, a federal court should not avoid its responsibility to determine all issues before it." Here, this Court determined en banc that whether South Dakota's definition of scope of employment incorporated "apparent authority" was not a close issue. The Court held that the South Dakota Supreme Court continues to recognize that "scope of employment" and "apparent authority" are "two distinct legal theories." Slip Op., p. 8. Thus, the question presented here was not appropriate for certification to the South Dakota Supreme Court.

This Court also noted that the issue of whether "apparent authority" is a part of "scope of employment" for purposes of South Dakota law is an issue that has no significance outside of the FTCA context. Slip Op., p. 6. As

the Court noted, any inquiry by the state court would be "necessarily hypothetical." Slip Op., p. 6, n. 4. Since FTCA cases are heard exclusively in federal courts (28 U.S.C. § 1346(b)(1)), it is only appropriate that a federal court decide this issue.

III. RESPONDEAT SUPERIOR LIABILITY UNDER THE LAW OF SOUTH DAKOTA IS NOT IDENTICAL TO LIABILITY AS LIMITED BY THE TERM "SCOPE OF EMPLOYMENT" IN 28 U.S. § 1346(b)(1).

Judge Lay[1] states, in his Petition, that "the law of respondeat superior of the State of South Dakota governs the liability of a tortfeasor under the Federal Tort Claims Act. See 28 U.S.C. § 1346(b)(1)." Lay Pet., p. 2. This is not completely accurate. That statute says:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by

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[1]The government does not address whether Judge Lay is a party under Fed. R. App. P. 35(b) or whether he relied correctly on "Eighth Circuit Rule of Appellate Procedure 35A(b)" as authority for filing his Petition for Rehearing en banc. Lay Pet., p. 1.

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(emphasis added). Thus, while the respondeat superior law of the state is certainly relevant to the liability of the United States for its employees, that liability is additionally subject to the statutory requirement that the employee have been "acting within the scope of his office or employment." This is the fundamental point that was recognized in this Court's en banc decision, but which Judge Lay cannot accept. Slip Op., p. 3.

Judge Lay cites eight cases to support his argument. Lay Pet., p. 2. None is supportive of his claim. He begins by citing Williams v. United States, 350 U.S. 857 (1955), a two sentence per curiam decision remanding an appellate decision in an FTCA case and stating that the case "is controlled by the California doctrine of respondeat superior." This decision is not significant here because, as the lower court later explained in the same case on remand:

> California law does not impose a respondeat superior liability unless at the time of the accident the employee of the Government

> was actively engaged in furthering his employer's business rather than his own personal ends.

Williams v. United States, 248 F.2d 492, 502 (9th Cir. 1957). In other words, California law at the time of the Supreme Court's decision defined "respondeat superior" and "scope of employment" similarly. Thus, Supreme Court's statement in Williams does not suggest that this Court's en banc decision in the current case, excluding "apparent authority" from the definition of "scope of employment," was incorrect in any respect.

Judge Lay's second citation (Lay Pet., p. 2), Tonelli v. United States, 60 F.3d 492 (8Th Cir. 1995) is no more relevant. In Tonelli, this Court found that a postal employee, while performing an illegal act, was still acting "within the scope of employment" because his superiors, who were aware of his behavior, allowed him to act illegally. The Court spoke of "apparent authority" as follows:

> [T]he post office tacitly authorized [the employee's] actions by failing to stop the interference after [the plaintiffs] provided notice of it. Such tacit authorization or apparent authority. . . .

60 F.3d at 495. The words "apparent authority" as used in

Tonelli referred to a situation in which the plaintiffs never saw the actions of the employees, much less relied on what they saw to their detriment. Those two words in the Tonelli case describe a completely different concept than when the same two words are used in the "doctrine of apparent authority." The "doctrine of apparent authority" is expressly concerned with the employee's apparent identity as an agent for his employer, when viewed by the plaintiff. The latter usage of "apparent authority" is the concept under consideration in this case. Tonelli is therefore irrelevant to this case.

Each of the other cases cited on page 2 of Judge Lay's Petition is similarly unhelpful to his argument because they hold only that "scope of employment" is governed by state law, a contention with which the government and the en banc majority (slip op., p.3) have not disagreed. None of the cases discusses "apparent authority." See Rodriguez v. Sarabyn, 129 F.3d 760, 766-67 (5th Cir. 1997); Richman v. Straley, 48 F.3d 1139, 1145 (10Th Cir. 1995); Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991); James v. United States, 467 F.2d 832, 833 (4th Cir. 1972); United States v. Farmer, 400 F.2d 107, 109-10 (8Th Cir. 1968)(holding that the test is whether the acts of the servant were done in furtherance of the master's business); O'Toole v. United States, 284 F.2d 792, 796 (2d Cir. 1960)(limiting the holding to cases in which a servant is acting on behalf of his employer).

On another matter, Judge Lay states that "[u]nder the

undisputed facts of the case, the BIA officer was acting within the scope of his employment when he offered the plaintiff. . . a ride in his BIA automobile." Lay Pet., p. 3. This is simply untrue. This court has affirmed en banc the district court's ruling that the BIA officer was outside the scope of his employment when the tort occurred (Slip Op. 8-10) and stated specifically that the BIA officer in this case "gave [the plaintiff] a ride because she was stranded far from town late on a cold night -- the kind of assistance any citizen might offer -- not to detain her as part of his law enforcement." Slip Op., p. 10 (emphasis added).

Finally, Judge Lay's conclusion that "the principles of apparent authority fall within the law of respondeat superior" (Lay Pet., p. 3), while correct, is irrelevant to the issue brought before this Court by the government in its earlier en banc petition. The question is, as this Court recognized, whether "apparent authority" was within the definition of "scope of employment", not whether "apparent authority" fits within the definition of respondeat superior.

CONCLUSION

For the reasons given above, the two Petitions for Rehearing en banc filed to review this Court's en banc decision of June 17, 1999, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused to be served twenty-one copies of the above "United States'Response To Appellant's And Judge Lay's Petitions For Rehearing en banc" on the Clerk of the Court of Appeals for the Eighth Circuit, and two copies on:

Scott McGregor
Attorney-at-Law
1617 Sheridan Lake Road
Rapid City, South Dakota 57702,

both being sent by Federal Express, postage prepaid, this /s/6th day of August, 1999.

/s/ William G. Cole
William G. Cole

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
ORDER DENYING
PETITIONS FOR
FOR REHEARING

File Stamped
Aug 20 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2691SDRC

Lesa M. Primeaux,	*
Appellant,	*
vs.	* Order Denying Petition for
United States of America,	* Rehearing and for Rehearing
Appellee.	* En Banc
	*

The Petitions for rehearing en banc are denied. Judge McMillian would grant the petitions.

The petition for rehearing by the panel is also denied. (5128-010199)

August 17, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

File Stamped
Aug 27 1999
/s/ Joseph Haas
Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2691SDRC

Lesa M. Primeaux,	*
Appellant,	*
vs.	* Appeal from the United States
United States of America,	* District Court for the
Appellee.	* District of South Dakota
	*

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.
(5172-010199)

June 17, 1999

A true copy.

ATTEST: /s/ Michael Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.